

1	FEDERAL TRADE COMMISSION				
2	I N D E X (PUBLIC RECORD)				
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4	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
5	Teagarden	185	213 (US)	268	280 (US)
6			259 (SP)		290 (SP)
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8	TRANSCRIPT READING		INV HRG		DEPO
9	Troup				
10	By Ginsburg/Apori		302		311
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1 FEDERAL TRADE COMMISSION

2

3 In the Matter of:)

4 SCHERING-PLOUGH CORPORATION,)

5 a corporation,)

6 and)

7 UPSHER-SMITH LABORATORIES,) File No. D09297

8 a corporation,)

9 and)

10 AMERICAN HOME PRODUCTS,)

11 a corporation.)

12 -----)

13

14 Thursday, January 24, 2002

15 12:00 p.m.

16 TRIAL VOLUME 2

17 PART 1

18 PUBLIC RECORD

19 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

20 Administrative Law Judge

21 Federal Trade Commission

22 600 Pennsylvania Avenue, N.W.

23 Washington, D.C.

24

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Back on the record, docket
4 9297. Good afternoon, everyone.

5 ALL COUNSEL: Good afternoon, Your Honor.

6 JUDGE CHAPPELL: You may or may not have gotten
7 copies -- Victoria, did you hand copies of the order to
8 the parties?

9 MS. ARTHAUD: I did.

10 JUDGE CHAPPELL: As of this morning, all the
11 pending motions for in camera treatment have been ruled
12 upon, except for Bristol-Myers, which I just received I
13 think yesterday, just so you know that they're no
14 longer pending. Some of them have been granted, some
15 of them have been granted provisional status for 20
16 days.

17 Any questions on in camera treatment?

18 MS. BOKAT: No, Your Honor.

19 JUDGE CHAPPELL: Any questions by respondents?

20 MS. SHORES: No, Your Honor.

21 MR. CURRAN: No, Your Honor, although we
22 haven't reviewed the order yet.

23 JUDGE CHAPPELL: I didn't want an imbalanced
24 record since the Government said something.

25 Just so everyone will know, if I'm looking

1 down, I'm not ignoring you. I've got a live transcript
2 going here on a laptop. So, don't think I'm sleeping
3 unless you hear me snoring, and don't think I'm
4 ignoring you, because there are times I look down to
5 see the live transcript while the witness is testifying
6 or while you're speaking sometimes.

7 I believe we're ready for the Government to
8 call their first witness or their next witness, the
9 first witness of the day.

10 MS. BOKAT: Your Honor, with the Court's
11 indulgence, we would call Russell Teagarden, and Mr.
12 Eisenstat is going to be examining the witness on
13 behalf of complaint counsel.

14 JUDGE CHAPPELL: That's fine.

15 MR. NIELDS: And Your Honor, Charles Loughlin
16 of my law firm -- our law firm is going to be cross
17 examining for Schering, and he has not yet sat at
18 counsel table. I wanted to introduce him to Your
19 Honor.

20 MR. LOUGHLIN: Good afternoon, Your Honor.

21 JUDGE CHAPPELL: Good afternoon, nice to meet
22 you, welcome to this courtroom.

23 MR. CURRAN: Your Honor, for Upsher, Mr. Jaime
24 Crowe will be handling this witness.

25 JUDGE CHAPPELL: Okay.

1 Whereupon--

2 RUSSELL TEAGARDEN

3 a witness, called for examination, having been first
4 duly sworn, was examined and testified as follows:

5 JUDGE CHAPPELL: Be seated and state your full
6 name for the record, please.

7 THE WITNESS: My name is Russell Teagarden.

8 JUDGE CHAPPELL: You may proceed.

9 DIRECT EXAMINATION

10 BY MR. EISENSTAT:

11 Q. Mr. Teagarden, by whom are you employed?

12 A. Merck-Medco Managed Care.

13 Q. Before we go into Merck-Medco, would you please
14 state your educational background since high school?

15 A. Bachelor of Science degree in pharmacy, Master
16 of Arts degree in research methodologies.

17 Q. And where did you get your Bachelor of Science
18 degree?

19 A. University of Illinois.

20 Q. And where did you get your Master of Arts
21 degree?

22 A. Loyola University of Chicago.

23 Q. Are you currently performing any other
24 educational activities?

25 A. I'm currently a visiting scholar at the

1 National Institutes of Health in the Department of
2 Clinical Bioethics.

3 JUDGE CHAPPELL: Counsel, can I stop you for a
4 second? Let's go off the record.

5 (Discussion off the record.)

6 JUDGE CHAPPELL: You may proceed. We're back
7 on the record.

8 BY MR. EISENSTAT:

9 Q. What does your position as a visiting scholar
10 at the National Institutes of Health entail?

11 A. Part of it is some didactic training for me,
12 and part of it is also some development work I'm doing
13 in certain areas that pertain to my occupation.

14 Q. And what is your occupation?

15 A. Currently, managing two different groups within
16 the Department of Medical Affairs at Merck-Medco.

17 Q. How long have you worked at Merck-Medco?

18 A. About eight and a half years.

19 Q. Prior to working at Merck-Medco, were you
20 working in the same area?

21 A. If "area" meaning related to health care --

22 Q. Yes, excuse me, health care, yes.

23 A. Yes, I have always worked in health care
24 related areas.

25 Q. Would you briefly describe your work experience

1 since getting your degree in pharmacy until you joined
2 Merck-Medco?

3 A. Following pharmacy school, I did a residency in
4 hospital pharmacy, that's for a year, went on staff at
5 Northwestern Memorial Hospital in Chicago in the
6 critical care areas for about four years or so, then
7 went into drug information specialty at St. Joseph
8 Hospital in Chicago. Two stints there interrupted by
9 about a year and a half in the technical support area
10 at Baxter International. Then I spent maybe near two
11 years in a medical communications firm. Then I came to
12 Medco.

13 Q. What is the business of Merck-Medco?

14 A. Merck-Medco is known as a pharmacy benefit
15 manager, and so it makes available services to
16 organizations that provide a pharmacy benefit.

17 Q. And could you describe the services that
18 Merck-Medco makes available?

19 A. Mostly management and administrative, so for
20 organizations providing pharmacy benefit, there's a
21 variety of administrative services, as simple as
22 adjudicating claims, reporting, putting together
23 pharmacy networks, making available mail service
24 pharmacy services, providing a variety of what are
25 known I guess as benefit management program services,

1 which can be a formulary, which can be prior
2 authorization.

3 Those -- that's somewhat representative, but
4 these are a range of services that are made available
5 to these plan sponsors, and they can choose what they
6 want from that catalog of services and programs.

7 Q. What kind of organizations would be plan
8 sponsors?

9 A. I'm not aware of any formal breakdown of that,
10 of those categories. I think of them in terms of
11 self-insured employers who will contract with us for
12 services, insurance carriers, managed care
13 organizations, unions, retirement systems, often
14 government agencies are carved out as a segment. Those
15 are the types of organizations that offer pharmacy
16 benefits.

17 Q. You mentioned the term "formulary." Could you
18 please explain to the Court here what a formulary is?

19 A. A formulary in its most basic configuration is
20 a list of drugs, and formularies are often used to
21 communicate the drugs that would correspond to a
22 pharmacy benefit, the drugs that are relevant to a
23 benefit, those that are necessary to be -- for a
24 benefit to be clinically sound, and it's also a way to
25 communicate that drugs that amongst a group of many

1 that do the same thing those that would be -- have some
2 sort of cost advantage to a payer organization.

3 Q. Is a formulary the same thing as a plan design
4 for a pharmacy benefits plan?

5 A. No.

6 Q. Could you explain what the difference is?

7 A. Well, plan design is -- refers to all the terms
8 and conditions by which a payer will pay for some
9 group's prescriptions, and formulary may or may not be
10 relevant to those terms and conditions. A formulary
11 can be simply a means of communicating what a plan
12 would prefer physicians to prescribe or plan members to
13 use, or they could, as a matter of the terms and
14 conditions, attach the formulary to the plan design in
15 such a way that the payment is based on whether a drug
16 is on the formulary or the amount of payment -- co-pay
17 could be derived from formulary positioning, but
18 these -- this isn't a requirement.

19 So, plan sponsors, sponsoring organizations,
20 decide first if they want a formulary involved at all,
21 and if so, how do they want the formulary to relate to
22 the plan design. It may have an effect on coverage; it
23 may not.

24 Q. About how many people are covered by the groups
25 that use Merck-Medco to provide pharmacy benefit

1 administration?

2 A. Sixty-five million.

3 Q. You mentioned mail service pharmacies as one of
4 the services that Merck-Medco provides. Is that right?

5 A. Right.

6 Q. Could you explain what mail service pharmacies
7 are?

8 A. Just as the name implies, these are pharmacies
9 owned and operated by Merck-Medco in which we make
10 available to plan sponsors, if they choose to use it,
11 and if they do, then their members can send their
12 prescriptions in to one of our mail service pharmacies,
13 and we'll fill them and dispense -- dispense the drugs.

14 Q. What is your current position at Merck-Medco
15 today?

16 A. Currently, vice president, Clinical Practices
17 and Therapeutics, and I'm also serving in an interim
18 role as vice president of Clinical Analysis and
19 Outcomes Research.

20 Q. When you say an interim role, could you explain
21 that?

22 A. Well, it means that I will not be managing that
23 group on a permanent basis. I took it on to -- because
24 we had some management needs there, and I took it on to
25 address those on a short-term basis.

1 Q. Your permanent position is vice president of
2 Clinical Practices and Therapeutics?

3 A. That's correct.

4 Q. What functions of Merck-Medco fall within
5 Clinical Practices and Therapeutics?

6 A. It's primarily a clinical development and
7 oversight function, so we develop and maintain the drug
8 intelligence for the company, so we are -- we have the
9 surveillance mechanisms in place to track all new drugs
10 that are coming to the market so that we can advise
11 plan sponsors on their allocation policies, we can
12 advise our own pharmacy practice on therapeutic matters
13 as new drugs come through and become available.

14 In the same manner, we track any information
15 that pertains to existing drugs and drug therapies for
16 the very same reasons. So, development and maintenance
17 of the drug intelligence of the company is a primary
18 function. Any benefit management programs, any
19 clinical programs, many of those are developed within
20 Clinical Practices and Therapeutics, the clinical
21 elements of them.

22 Then there's oversight of company programs and
23 communications that are intended to have effect on a
24 member's or could have an impact on a member's health.
25 So, we review a lot of program materials,

1 communications and so forth.

2 There's a function in our department that
3 pertains to adjudicating appeals of coverage, denials
4 that might have come out of the prior authorization
5 program. So, we operate what we call the appeals
6 decision committee. And then we have a group within
7 clinical practices and therapeutics that supports
8 clinical practice policy and training of our pharmacy
9 practice, that being the mail service pharmacies.

10 Q. Does Merck-Medco have its own formularies?

11 A. Merck-Medco does.

12 Q. And how many formularies does Merck-Medco have?

13 A. Three.

14 Q. And what are those three formularies?

15 A. One is known as Preferred Prescriptions,
16 another is known as RX Selections, and another is known
17 as the Universal Formulary.

18 Q. And what are the differences between these
19 formularies?

20 A. The differences generally relate to the breadth
21 of the drugs included on these formularies.

22 Q. Could you explain that a little bit?

23 A. For example, the Universal Formulary has the
24 broadest range of drugs that are relevant to a
25 prescription drug benefit. RX Selections is the

1 narrowest of the three, and Preferred Prescriptions
2 would be in the middle of those three.

3 Q. Do you have any duties and responsibilities
4 with respect to the formularies?

5 A. I am responsible for the clinical content of
6 those formularies.

7 Q. Could you explain what you mean by "clinical
8 content of those formularies"?

9 A. In the development of the formularies, we take
10 a step-wise approach, and the first step is to ensure
11 that all the drugs that need to be on a formulary to
12 address the scope of conditions that a pharmacy
13 benefit -- a typical pharmacy benefit encompasses are
14 on there. So, that's the first step, to make sure that
15 clinically the formularies are sound and complete.

16 The second step has to do with choosing the
17 drugs amongst those that are considered interchangeable
18 clinically. The second step then involves other
19 factors in the choice. So, my role is primarily in
20 managing the process that gets that first step, and
21 that's managed through our Pharmacy and Therapeutics
22 Committee.

23 Q. Could you explain what the Pharmacy and
24 Therapeutics Committee is?

25 A. The Pharmacy and Therapeutics Committee is a

1 group of medical and pharmacy specialists, there are
2 eight, who are charged with determining insofar as the
3 formulary is concerned what drugs must be on that
4 formulary to meet clinical criteria and what drugs
5 cannot be. These members are independent in that none
6 is an employee of Merck or Merck-Medco. They have been
7 vetted internally for bias, conflict of interest,
8 through disclosures that we ask them to make. They are
9 specialists in certain areas, and they are actively
10 practicing as well.

11 They are given what we call internally, you
12 know, regulatory authority as to be distinguished from
13 just purely advisory. So, when this committee
14 determines that for clinical reasons a drug must be on
15 the formulary, then our policies require that we comply
16 with that decision, and if they say a drug cannot be on
17 the formulary, our policies require that we not put the
18 drug on the formulary.

19 Q. What's the decision process that would go on at
20 this Pharmacy and Therapeutics Committee to come to the
21 conclusion that a drug has to be on the formulary?

22 A. Well, the committee members would evaluate all
23 the available information on a drug at the time, and
24 they would deliberate in a -- together at one of their
25 meetings, and they would arrive at their conclusion.

1 Q. Does the committee consider any economic
2 factors when they're arriving at their conclusion?

3 A. No, it's not a basis of their decision.

4 Q. When the committee is -- this Pharmacy and
5 Therapeutics Committee is considering a drug, are the
6 only two decisions they can make that the drug must be
7 or must not be on the formulary?

8 A. No, there's one other, and they will say, well,
9 it may be on the formulary. That distinction is
10 arrived at by a conclusion that from -- on a clinical
11 basis that the drug does not have any advantages over
12 what's available nor disadvantages, and so it's -- it's
13 more of a statement of indifference, that from a
14 clinical basis, it won't matter.

15 Q. When they arrive at this indifference, where on
16 a clinical basis it doesn't matter, how is the decision
17 made then whether or not that drug then goes on the
18 formulary?

19 A. Well, that becomes a decision of Merck-Medco,
20 and Merck-Medco makes that decision then based on other
21 factors, and those other factors include the economics
22 involved. It can involve convenience factors, other
23 types of factors. It's driven mostly by the economics.
24 There can be others.

25 Q. Does the Pharmacy and Therapeutics Committee

1 consider both generic and brand name drugs?

2 A. Well, the committee doesn't really make a
3 distinction. It's not a distinction of any relevance
4 to their particular decision. They are already -- they
5 are thinking of the generic entity, not a generic
6 product as, you know, we know it, but they're thinking
7 of the generic entity, and they may not even know the
8 brand name. They don't care. It's is this drug
9 entity -- does this drug entity have to be on the
10 formulary? So, it's -- there's never -- there's not
11 much relevance to whether it's a brand or not.

12 Q. Do the use of formularies and plan design have
13 an impact in controlling prescription drug benefit
14 costs?

15 A. The use of formularies does have an impact.

16 Q. Could you explain that?

17 A. Not in great -- I could not explain that in
18 great detail, because I don't know, you know, a lot of
19 the economics around it. I know that it has an impact,
20 but I'd have to tell you that in the course of my day,
21 it's just not something I come into contact with.

22 Q. Does plan design have an impact on controlling
23 the costs of prescription drug benefit plans?

24 A. It can.

25 Q. Could you explain that?

1 A. Well, plan designs can be associated with terms
2 and conditions that serve as or at least result in
3 incentives to prescribers and plan members. So, if a
4 plan member knows that there could be certain -- or a
5 physician knows that the choice could affect how much
6 they pay, then that could affect their choices.
7 There's all kinds of different plan designs that --
8 that may introduce incentive or not. There can be some
9 plan designs that it simply says submit the claim and
10 we'll pay it, and so in that case, no. There can be
11 others that say we'll pay for generic -- only the
12 generic versions of a particular drug if there's an A-B
13 rating available, and if you want it, then you pay more
14 or you may pay a co-pay, and when that's known, then
15 that will drive choice. So, it depends on what the
16 plan design is.

17 Q. When you use the term "A-B rated" for a
18 generic, could you explain what that means?

19 A. It means that the FDA has decided that a
20 generic -- a particular generic product is
21 bioequivalent as defined by the FDA to a reference
22 standard.

23 Q. When an A-B rated generic drug is first
24 available, what, if anything, does Merck-Medco do?

25 A. Merck-Medco does what its plan sponsors have

1 asked it to do, and there is a range of activities that
2 Merck-Medco can provide, such as to administer or
3 adjudicate the plan according to its specifications,
4 and if a plan sponsor has said that we require higher
5 co-payments for brand name drugs when an A-B rated
6 generic is available, then upon the time that that A-B
7 generic becomes available, then the adjudication
8 changes accordingly. So, Merck-Medco as the
9 administrator would effect that adjudication change.

10 There can also be different kinds of
11 communications to let prescribers know about the
12 availability. It changes the mail service pharmacy
13 practice patterns such that there is now -- there could
14 then be generic substitution according to pharmacy
15 practice standards and applicable law that kicks in.
16 So, there's a range of activities. Some of it's a
17 matter of pharmacy practice; some of it's a matter of
18 plan sponsor requests.

19 Q. You mentioned generic substitution in your mail
20 service pharmacy practice. What do you mean by
21 "generic substitution"?

22 A. It means that when a prescription comes in
23 written for a brand name drug, that if there's an A-B
24 rated generic available, the pharmacy would fill that
25 prescription with the generic alternative unless there

1 were reasons not to, and those reasons could be --
2 there's a variety of reasons. It could be that the
3 physician has expressly requested or required that the
4 brand name be used. There could be other applicable
5 local laws and regulations that I'm not aware of that
6 can play into it. That's usually what happens.

7 Q. Do your formularies include potassium chloride
8 supplements?

9 A. They do.

10 Q. And why are potassium chloride supplements
11 included in your formularies?

12 A. Well, it's -- they're required by our P&T
13 Committee first of all, and they are relevant to the
14 typical prescription drug benefit, and that's because
15 they're important in drug therapy.

16 Q. Do you know why they're important in drug
17 therapy?

18 A. Yes, potassium hemostasis is important for many
19 different physiological processes, and if someone
20 doesn't have enough potassium, it can be very
21 dangerous. If somebody has too much potassium, it can
22 be very dangerous.

23 Q. You said potassium and began with hemo, and I
24 lost you after that.

25 A. I'm sorry, say it again.

1 Q. You used the term potassium, and then you said
2 hemo --

3 A. Oh, hemostasis?

4 Q. Yes. Could you explain what that is?

5 A. It would probably be homeostasis, and what I'm
6 referring to is a physiologic stability, metabolic
7 stability.

8 Q. Going back a moment to what happens when a new
9 generic -- A-B rated generic version of a drug becomes
10 available, how would Merck-Medco find out that a new
11 A-B rated generic drug was going to become available?

12 A. That information is available in the public
13 domain, and part of our surveillance and development of
14 drug intelligence includes monitoring of when
15 single-source brand drugs will lose their market
16 exclusivity. So, that's something we aggressively
17 track.

18 Q. And why do you aggressively track that?

19 A. The use of generic drugs is of great interest
20 to most of our plan sponsors. They see it as an
21 opportunity to get some cost efficiencies into their
22 plans.

23 Q. We were talking -- before I began to talk about
24 a new generic drug, we were talking about potassium
25 levels not being appropriate, being too high or too

1 low. Do you know what the dangers are from potassium
2 levels being too low?

3 A. Well, I know some. I wouldn't want to suggest
4 that I'm a potassium expert, but I know some, and in
5 particular, when potassium levels are too low, there's
6 a risk of heart rhythm disturbances that can be fatal.
7 Similar reactions occur when it's too high, but there
8 is also other metabolic consequences, and like I say,
9 it's -- I'm not a potassium expert.

10 Q. Are potassium chloride supplements one of the
11 top categories of cost for someone that's funding a
12 pharmacy benefit program?

13 A. No.

14 Q. If you were ranking potassium supplements, do
15 you know about where they would rank if we were looking
16 down a list of drug categories in terms of cost for a
17 typical pharmacy benefit plan?

18 A. I don't know where they would rank. They might
19 not even be ranked.

20 Q. And why might that -- why might they not be
21 ranked?

22 A. They might be low enough where the list -- at
23 that end of the list, it wouldn't be of too much
24 interest.

25 Q. When you say "at that end of the list, it might

1 not be of too much interest," does that mean it's an
2 unimportant drug?

3 A. No, it's -- potassium supplements are very
4 important drugs. They're very important drugs. When
5 evaluating what contributes to the costs of providing
6 pharmacy benefit, that category, potassium supplements,
7 is not a big driver compared to others.

8 Q. Does that mean the cost of potassium chloride
9 drugs is unimportant to the organizations for which
10 Merck-Medco is providing pharmacy benefits?

11 MR. LOUGHLIN: Objection, vague and calls for
12 speculation.

13 JUDGE CHAPPELL: Excuse me?

14 MR. LOUGHLIN: Vague and calls for speculation.
15 Also, no foundation, Your Honor.

16 JUDGE CHAPPELL: Well, I think he's -- do you
17 have a response to that?

18 MR. EISENSTAT: I think he's demonstrated an
19 understanding of the pharmacy benefit plans and has the
20 foundation to address this question. He knows it's a
21 relatively low-cost product and not a driver, and I was
22 merely asking him then, to go on, if that meant it had
23 no consequences.

24 JUDGE CHAPPELL: Okay, the other objection was
25 vague.

1 MR. EISENSTAT: I would ask if the witness
2 would understand the question.

3 JUDGE CHAPPELL: Can you answer the question?

4 THE WITNESS: I can.

5 JUDGE CHAPPELL: Okay, both objections are
6 overruled. Proceed.

7 THE WITNESS: I'd answer it to say that -- on
8 the basis that plan sponsors are knowledgeable about
9 what drugs are contributing to the costs and what's
10 contributing to the increase, the incremental increase
11 year to year, and will often ask us about ideas or ask
12 us for certain services directed at certain categories,
13 and this is not a category that's ever been raised.

14 BY MR. EISENSTAT:

15 Q. How about to individual patients, would the
16 cost of a potassium chloride product in one of the
17 plans be unimportant to individual patients?

18 A. Not to an individual patient, because -- it can
19 be very important to the patient, because their cost
20 for these drugs is probably very similar to the cost of
21 any drug because of the co-payment structures and so
22 forth, whereas plan design would say your co-payment
23 for a brand is \$50 and for a generic it could be -- it
24 could be \$10. There's all kinds of different ranges,
25 that's not necessarily representative. And that

1 doesn't matter whether it was potassium or an
2 antibiotic or anything else. So, that difference is
3 usually not manifest at the level of the patients. So,
4 it generally can be of greater significance to the
5 individual plan member than it would be to a plan
6 sponsor.

7 MR. EISENSTAT: Your Honor, I'd like to
8 approach the witness and hand him what's been marked as
9 CX 57. This has not been offered yet into evidence.
10 It has been marked as an exhibit, but I would ask that
11 I be allowed to show it to the witness and see if he
12 can identify it.

13 JUDGE CHAPPELL: Sure. Mr. Eisenstat, could
14 you speak up? Fill the room with your knowledge. I'm
15 having trouble hearing.

16 MR. EISENSTAT: I'm sorry, I'm sorry.

17 JUDGE CHAPPELL: Thank you.

18 MR. EISENSTAT: I will try to do better, Your
19 Honor.

20 BY MR. EISENSTAT:

21 Q. Mr. Teagarden, are you familiar with the
22 document that's been marked CX 57?

23 A. I am.

24 Q. And what is this document?

25 A. This is Preferred Prescriptions, which is one

1 of the Merck-Medco formularies made available to the
2 clients.

3 Q. And the document itself, is this the complete
4 formulary?

5 A. This is not.

6 Q. Okay. And what's contained in the document?

7 A. Some of the first pages, it's descriptive about
8 the formulary, and the chapter of Vitamins, Hematinics
9 and Electrolytes.

10 Q. And does that chapter include potassium
11 chloride supplements?

12 A. It does.

13 Q. And is this produced by Merck-Medco in its
14 business?

15 A. It is.

16 MR. EISENSTAT: Your Honor, I'd like to offer
17 Exhibit CX 57 into evidence.

18 MR. CROWE: No objection, Your Honor.

19 MR. LOUGHLIN: No objection, Your Honor.

20 JUDGE CHAPPELL: CX 57 is admitted.

21 (Commission Exhibit Number 57 was admitted into
22 evidence.)

23 MR. EISENSTAT: And I'd also like to approach
24 the witness and show him another exhibit, CX 56, Your
25 Honor.

1 JUDGE CHAPPELL: Proceed.

2 MR. EISENSTAT: And again, this document has
3 not been offered into evidence yet.

4 JUDGE CHAPPELL: Okay.

5 BY MR. EISENSTAT:

6 Q. Mr. Teagarden, do you have CX 56 in front of
7 you?

8 A. I do.

9 Q. And can you identify this document for us?

10 A. This is the RX Selections Formulary.

11 Q. And again, is this the entire formulary?

12 A. It is not.

13 Q. And could you describe what the pages are that
14 you have in front of you?

15 A. It's the first few pages of the formulary
16 describing it, and Chapter 15 on Vitamins, Hematinics
17 and Electrolytes.

18 Q. And again, would that include potassium
19 chloride supplements?

20 A. It does.

21 Q. And is this produced by Merck-Medco?

22 A. It is.

23 MR. EISENSTAT: And Your Honor, I'd like to
24 offer CX 56 into evidence at this time.

25 MR. CROWE: No objection, Your Honor.

1 MR. LOUGHLIN: No objection, Your Honor.

2 JUDGE CHAPPELL: CX 56 is admitted.

3 (Commission Exhibit Number 56 was admitted into
4 evidence.)

5 BY MR. EISENSTAT:

6 Q. Mr. Teagarden, would you look at CX 56 and turn
7 to the page that has the heading Vitamins, Hematinics
8 and Electrolytes. Do you have that page in front of
9 you?

10 A. I have it.

11 Q. Under Potassium, there is a list of potassium
12 tablets, powders, solutions. Do you see that list?

13 A. I do.

14 Q. What is this list showing?

15 A. This lists the formulary potassium supplements
16 that are in tablet, powder and solution dosage forms.

17 Q. Why are there multiple dosage forms on the
18 formulary?

19 A. These would be the dosage forms that the
20 independent P&T Committee feel necessary to include.

21 Q. Do you know why they feel it necessary to
22 include these dosage forms?

23 A. The reason is that potassium chloride is not
24 well tolerated by patients. It's not a pleasant -- by
25 itself in solution, it's not a pleasant taste, and it

1 can be sufficiently unpleasant and poorly tolerated
2 that people won't take it. So, over the years, the
3 decades, there have been a variety of dosage forms that
4 have been engineered to make it more palatable,
5 acceptable, better tolerated, and patients tend to do
6 better with one or the other, and this happens to be
7 the range that is necessary to find one for a patient
8 to accept.

9 Q. Do you see the product on here K-Dur 20
10 milliequivalent?

11 A. I do.

12 Q. Do you have any personal experience in your
13 background as a pharmacist with the K-Dur brand of
14 potassium chloride?

15 A. I do.

16 Q. Could you relate that experience to the Court?

17 A. Well, as a pharmacist in hospital practice,
18 clinical practice, encountering problems getting
19 patients to stay on potassium, to take it as needed,
20 was always a big challenge. It was always on the basis
21 that it was so intolerable. Despite all these dosage
22 forms, very often it was hard to get a patient to take
23 them.

24 And so I recall I was still in the hospital
25 when K-Dur came out, and the manufacturer

1 representative came and said try this. All you've got
2 to do is take this tablet, drop it in the water, and it
3 immediately didn't dissolve completely, but it
4 disbursed significantly, and then drink it, and I did
5 that, and I drank it, and there was no taste, and it
6 was amazing, and I thought that this was a real
7 advance. I thought it was going to really be -- it was
8 really going to help patients to take this potassium
9 supplement.

10 So, I thought it was a significant advance and
11 actually worked hard in the hospital to get adoption of
12 it, because I thought it was going to really help us.

13 Q. Going back to the mail service pharmacies that
14 Merck-Medco operates, when a new generic drug of what
15 had formerly been a single-source product is brought
16 out, does Merck-Medco have any kind of generic
17 utilization rate that it's going to see with respect
18 to -- or expects with respect to replacing the
19 single-source drug with the new generic?

20 A. I'm not sure if I'm -- if I understand exactly
21 what you're looking for.

22 Q. Well, let me try that again. I apologize.

23 We talked before about what happens when a new
24 A-B rated generic drug came out. Do you recall?

25 A. Yes.

1 Q. And we talked about Merck-Medco has their own
2 mail pharmacies.

3 A. Right.

4 Q. And I believe you explained that there's
5 generic utilization that goes on at those pharmacies
6 when a new generic comes out. Is that right?

7 A. That's correct.

8 Q. How much of the -- is there a typical amount
9 that the generic would replace of a brand name drug at
10 the Merck-Medco pharmacies when the generic comes out?

11 A. Let me try and be specific here. This is not
12 something I study as a matter of course. I'm familiar
13 with what the company says, and the company advises
14 plan sponsors that to encourage generic product
15 utilization, it can have an impact of lowering the cost
16 of those products between 30 and 60 percent.

17 Now, that means that a lot of activity goes on
18 there to achieve that. It can be -- it can be
19 combinations of plan design elements, educational
20 efforts and substitution efforts within our own mail
21 service pharmacies. So, that number of 30 to 60
22 percent that the company advises plan sponsors on is
23 from this combination of activities that can occur.

24 Within the Merck-Medco pharmacies, the mail
25 service pharmacies, the company tells plan sponsors

1 that when a drug -- a single-source brand is made -- an
2 A-B rated generic is made available for a single-source
3 brand, that the conversion of brand name prescriptions
4 to generic that come in through the Merck-Medco mail
5 service can be between 70 and 90 percent within the
6 first 90 days. But that's what's contributing to that
7 30 to 60 overall. So, I just want to make sure the
8 numbers are understood correctly.

9 Q. Are you familiar with the term "maximum
10 allowable cost"?

11 A. Yes.

12 Q. Could you explain what that is?

13 A. Well, by definition, it could be applied to any
14 sort of allocation policy, plan design, whereby there's
15 a condition or term that says this is the most we'll
16 pay for X. So, you can define it, you know, very
17 clearly, attach it to anything. We will only pay this
18 much for this, that becomes the maximum allowable cost.

19 Without defining it, a lot of people will think
20 of it as something assigned to generic drug products,
21 and if you ask a bunch of people in this industry
22 what's meant by maximum allowable cost, I think what
23 you would usually hear, that it's the most a plan
24 sponsor will reimburse for a generic product amongst a
25 group of other generic products.

1 Q. When a brand name drug is not covered on a
2 benefit plan and a consumer has a prescription for a
3 drug, is the consumer free to obtain that drug outside
4 of the drug benefit plan and pay the cost?

5 A. Certainly. The terms and conditions of a plan,
6 plan design, pertains only to what will be paid for,
7 and if there is a drug that's just not covered, if
8 there -- there's no reason a pharmacist cannot dispense
9 it for that reason. If there are clinical
10 considerations, legal considerations, that's another
11 matter, but if a plan doesn't cover the drug, a drug,
12 and a plan member is willing to pay for it, to fund it
13 in some other manner, then they can get it.

14 Q. Are you familiar with a term "three-tier
15 co-pay"?

16 A. I am.

17 Q. Can you explain what that is?

18 A. That means there are three different
19 co-payments, and what -- what -- and there can be
20 conditions that determine which co-payment is assigned
21 to a particular prescription. The most common
22 configuration currently for a three-tier would be the
23 lowest co-pay for a generic product, the highest co-pay
24 for a nonformulary drug, drugs not listed on the
25 formulary, usually a brand -- a single-source brand

1 name drug or even multi-source brand name drug not on
2 the formulary, and the middle tier, the middle
3 co-payment, is usually a formulary brand name product.

4 MR. EISENSTAT: I have no more questions at
5 this time, Your Honor.

6 JUDGE CHAPPELL: Okay, thank you.

7 MR. CROWE: Excuse me, Your Honor, I'll just
8 take a minute to set up.

9 JUDGE CHAPPELL: This might be a good time for
10 me to let the parties know, we're getting some new
11 exhibits, and I'm getting demonstrative exhibits. At
12 the end of the day, after I leave, you need to come
13 here and take your copies back. Otherwise, there will
14 be more of a fire hazard in this courtroom. Thank you.

15 CROSS EXAMINATION

16 BY MR. CROWE:

17 Q. Good morning, Mr. Teagarden.

18 A. Good morning.

19 Q. I'm Jaime Crowe, I represent Upsher-Smith. We
20 met before at your deposition, if you recall.

21 A. Indeed.

22 Q. Sir, let me start by asking you just a few
23 questions off of CX 57, and if you would turn to --
24 well, it's page 3 -- it's page 191, Merck-Medco 191.
25 It's the list of electrolytes that you discussed

1 earlier.

2 A. This is CX 57?

3 Q. This is CX -- CX 57, that's right.

4 A. Mine says page 35.

5 Q. Yeah, there's a -- there's also a production
6 number --

7 A. I see.

8 Q. -- 191 there.

9 A. Got it.

10 Q. Now, this document lists different potassium
11 forms or products that are available on this version of
12 Merck-Medco's formulary, correct?

13 A. Correct.

14 Q. And it includes K-Dur 20 mEq, right, at the
15 very bottom?

16 A. What do you mean by "includes"?

17 Q. Well, it's one of the brands that's listed,
18 correct?

19 A. It is listed.

20 Q. And there's an indication -- there's a column
21 there for Relative Cost. Do you see that?

22 A. I see it.

23 Q. And under that column there are a series of
24 dollar signs, correct?

25 A. Correct.

1 Q. And these dollar signs indicate the relative
2 cost of these different potassium products, correct?

3 A. Correct.

4 Q. So that, for example, for potassium
5 bicarbonate, K-Lyte, you have one dollar sign, correct?

6 A. Correct.

7 Q. And for potassium chloride capsule, you have a
8 single dollar sign as well, right?

9 A. Right.

10 Q. So that the relative cost of these two products
11 is comparable, correct?

12 A. Correct.

13 Q. If you go down to the bottom of the list, next
14 to K-Dur you have two dollar signs, correct?

15 A. Correct.

16 Q. And above that, for potassium chloride tablet,
17 you have two dollar signs as well, correct?

18 A. Correct.

19 Q. Above that, for potassium chloride capsule, you
20 have two dollar signs as well. Do you see that?

21 A. I see it.

22 Q. So, these all have relatively similar costs,
23 correct?

24 A. At the time this was put together.

25 Q. Right. Let me ask you some other questions

1 about this formulary and how it works.

2 I see that there is a plus sign up at the top
3 of potassium chloride bicarbonate, the very first
4 potassium product that's entered. Do you see that?

5 A. I see it.

6 Q. And that -- if you go down to the legend on
7 this document, the plus sign means that a generic is on
8 the formulary and the brand is nonformulary, correct?

9 A. That's what it says.

10 Q. Right. So, according to this document, there
11 is a generic available for potassium bicarbonate,
12 correct?

13 A. Correct.

14 Q. It also lists a brand name product called
15 K-Lyte, correct?

16 A. Correct.

17 Q. Now, the brands that are listed in this column
18 are not intended to be an exhaustive list of all
19 possible brands for each of these potassium products,
20 right?

21 A. That's how that column is represented, yes.

22 Q. So, in the first example that we have,
23 potassium bicarbonate citric acid where the brand is
24 K-Lyte, we know that at a minimum there are two
25 different potassium products available, at least one

1 generic and at least one brand, correct?

2 A. Correct.

3 Q. But there may be more generics and there may be
4 more brands than what you can tell from the document
5 itself, correct?

6 A. Correct.

7 Q. You can set that document aside.

8 Could you turn to CX 56, please, and if you
9 would go to page 36 of the formulary, which is the same
10 as Merck-Medco production number 197.

11 A. Got it.

12 Q. You have another list of electrolytes and
13 potassium products, correct?

14 A. Correct.

15 Q. And the representation of the plus sign in this
16 formulary works the same way as in the formulary that
17 we just saw, CX 57, correct?

18 A. Right.

19 Q. If you go down to the bottom of the list, do
20 you see next to K-Dur there are two dollar signs,
21 right?

22 A. Right.

23 Q. And if you drop down to the very last entry,
24 potassium chloride capsule, you have two dollar signs
25 as well there, correct?

1 A. Correct.

2 Q. And according to the formulary, that means that
3 the relative cost of these two products is about the
4 same, correct?

5 A. At the -- correct, at the time this was put
6 together.

7 Q. Could you turn to the last page of this
8 exhibit, and we're still on Exhibit 56. Do you see at
9 the bottom there -- let me zoom in here. All right, if
10 you look on your screen, can you see that? There's an
11 indication there that this is the Merck-Medco formulary
12 for 2001, correct?

13 A. Copyright 2001.

14 Q. Copyrighted 2001, all right. That's Exhibit CX
15 56, and I apologize for doing this, but could you go
16 back to CX 57, and if you would turn to the last page
17 there. According to this document, this is also
18 copyrighted in 2001, correct?

19 A. Correct.

20 Q. You can set that document aside, thanks.

21 Your Honor, may I approach the witness?

22 JUDGE CHAPPELL: Yes, you may.

23 MR. CROWE: Thank you.

24 BY MR. CROWE:

25 Q. Sir, do you have a document with production

1 number USX 131 in front of you?

2 A. I do.

3 Q. If you would turn the page, please, go to the
4 second page -- well, I'm sorry, let's stay on the top
5 page. This indicates that it's a document from
6 Merck-Medco Managed Care, L.L.C., correct?

7 A. That's what it says.

8 Q. And the sender according to the document is
9 Anthony Palmisano, Junior, correct?

10 A. Correct.

11 Q. And he's one of the in-house attorneys at
12 Merck-Medco, correct?

13 A. Correct.

14 Q. In fact, he represented you at your deposition
15 in this matter, correct?

16 A. Me personally?

17 Q. Well, when you were deposed in connection with
18 this matter.

19 A. The company, yes.

20 Q. And it's addressed to several attorneys, right?
21 If you would turn the page --

22 JUDGE CHAPPELL: Excuse me, Counsel, but I
23 believe you asked a question and didn't get an answer.

24 BY MR. CROWE:

25 Q. I'm sorry, did you answer the question?

1 What was the last question?

2 (The record was read as follows:)

3 "QUESTION: And it's addressed to several
4 attorneys, right?"

5 THE WITNESS: I can't attest to their
6 occupations.

7 BY MR. CROWE:

8 Q. Fair enough.

9 If you turn to the second page of the document,
10 it's a letter from Mr. Palmisano to counsel, and it
11 indicates that attached are documents responding to a
12 subpoena for documents, right?

13 A. Right.

14 Q. That was served on Merck-Medco, right?

15 A. As I understand it.

16 Q. Then if you turn the page again, there are a
17 bunch of documents, right, and -- do you see that? You
18 have documents attached to it, right?

19 A. Yes, I have documents. I don't know what "a
20 bunch" is, but yes, I have documents.

21 Q. Okay. At the bottom of each of these
22 documents, do you see Merck-Medco 199?

23 A. I do.

24 Q. And these are the production numbers that were
25 placed on the documents by Merck-Medco, correct?

1 A. I couldn't tell you that.

2 Q. You -- according to the letter that Mr.
3 Palmisano sent to counsel, it indicates that these are
4 Merck-Medco documents, and it bears numbers 199 through
5 216, right?

6 A. That's what it says.

7 Q. All right. If you would turn to the next page,
8 the production number there is 199, correct?

9 A. Correct.

10 Q. And the last page that you have is -- well,
11 second to the last is 215, correct?

12 A. Correct.

13 Q. So, these are Merck-Medco documents that Mr.
14 Palmisano sent, correct, according to the letter?

15 A. Appears to be so.

16 MR. CROWE: Your Honor, I move for the
17 admission of USX Exhibit 131.

18 JUDGE CHAPPELL: Any objection?

19 MR. EISENSTAT: No objection, Your Honor.

20 JUDGE CHAPPELL: Accordingly, USX 131 is
21 admitted.

22 (USX Exhibit Number 131 was admitted into
23 evidence.)

24 BY MR. CROWE:

25 Q. All right, sir, if you would turn to

1 Merck-Medco 199, and according to this Merck-Medco
2 document, you have a page at the top of which says
3 "Proposed Additions/Deletions to Paid National
4 Formulary," correct?

5 A. Correct.

6 Q. And the Paid National Formulary is
7 Merck-Medco's formulary, correct? Isn't that what the
8 formulary from Merck-Medco is called, the Paid National
9 Formulary?

10 A. I don't know it as such.

11 Q. Could you turn to the next page? And according
12 to this Merck-Medco document, you have a series of
13 columns, correct?

14 A. Correct.

15 Q. Do you see that under Class, we have a
16 designation of 15.3.1?

17 A. I see it.

18 Q. And then we have another column for Drug (Brand
19 Name). Do you see that?

20 A. I do.

21 Q. And next to 15.3.1, you have potassium chloride
22 20 mEq (K-Dur 20 mEq). Do you see that?

23 A. I see it.

24 Q. And there's a Proposed Action column. Do you
25 see that at the top?

1 A. I see it.

2 Q. And according to the Proposed Action column,
3 next to potassium chloride 20 mEq, we have the word
4 "delete," correct?

5 A. Correct.

6 Q. And then we have another column that indicates
7 it's Alternative Agents on Formulary, correct?

8 A. Correct.

9 Q. Do you see that?

10 And if you go down the list, it indicates that
11 alternative agents on formulary include Klor packets,
12 right?

13 A. That's what it says.

14 Q. And that's a powdered form of potassium,
15 correct?

16 A. I don't recall.

17 JUDGE CHAPPELL: Mr. Crowe, excuse me,
18 apparently the witness can see this, but for the
19 benefit of those in the courtroom, you might want to
20 focus the ELMO.

21 MR. CROWE: Oh, thank you, sir. I think that
22 may be about as good as it gets. There we go, that's a
23 little better.

24 BY MR. CROWE:

25 Q. Mr. Teagarden, below potassium chloride mEq --

1 below Klor packets, we have potassium chloride 10 mEq
2 and in parentheses, Klotrix, K-Tab, Ten-K and Klor Con.
3 Do you see that?

4 A. I see it.

5 Q. And then below that, we have potassium chloride
6 10 mEq (Micro-K). Do you see that?

7 A. I see it.

8 Q. There's also another column for Relative Cost.
9 Do you see that?

10 A. I see it.

11 Q. And if you do go to the Relative Cost column
12 for K-Dur, there are three dollar signs, right?

13 A. Yes.

14 Q. And for the Klor packets, there are also three
15 dollar signs, right?

16 A. Right.

17 Q. And that means that they have about the same
18 relative cost, correct?

19 A. Correct.

20 Q. Could you please turn to production page number
21 202 on the document, and according to this -- well,
22 first of all, do you know whether this page has been
23 redacted?

24 A. I don't know.

25 Q. Okay. But this appears to be at least part of

1 an agreement, right?

2 A. It appears to be.

3 Q. And it's between Medco, do you see that?

4 A. Yes.

5 Q. And Schering Corporation, correct?

6 A. Right.

7 Q. Now, Medco was Merck-Medco's predecessor,
8 correct?

9 A. Yes.

10 Q. It was Medco before it was acquired by Merck,
11 right?

12 A. Correct.

13 Q. And that's Merck Pharmaceuticals, right?

14 A. Right.

15 Q. If we flip to the next page, it appears that
16 the agreement continues, right, because if you look at
17 the next page, it has a 2 under there, right? And then
18 if we flip again, it continues onto page 3, and there
19 are further provisions, right?

20 A. It has that appearance. I can't, you know,
21 attest to it by any familiarity with these agreements,
22 because I don't come across them.

23 Q. And then we have page 4. Now, why don't we go
24 all the way to Merck-Medco page 206, which is the next
25 page after that.

1 A. Okay.

2 Q. And according to this agreement between
3 Schering and Medco, you have a chart with three
4 columns, right? And do you see there's one column for
5 Schering Product? Do you see that?

6 A. Right.

7 Q. And underneath that you have K-Dur, right?

8 A. Right.

9 Q. You have another column for a Market Share
10 Rebate Percentage. Do you see that?

11 A. I see it.

12 Q. And it looks like the percentage has actually
13 been redacted from the document, correct?

14 A. Correct.

15 Q. And then you have another column for Competing
16 Products, right?

17 A. Right.

18 Q. And according to this list, we have K-Dur at
19 the top of the list. Do you see that?

20 A. I see it.

21 Q. And there's both a K-Dur 10 and a K-Dur 20
22 potassium supplement product, correct?

23 A. Listed.

24 Q. Beneath that we have Micro-K 10, correct?

25 A. Yes.

1 Q. Then we have Slow-K.
2 A. Right.
3 Q. Then we have K-Tabs, right?
4 A. Yes.
5 Q. Klor Con 10, right?
6 A. Yep.
7 Q. Klor Con 8, correct?
8 A. Yes.
9 Q. Klotrix?
10 A. Yes.
11 Q. Ten-K?
12 A. Right.
13 Q. K-Lease?
14 A. Right.
15 Q. Kaon CL-10? Right?
16 A. Right.
17 Q. Kaon CL?
18 A. Right.
19 Q. Kaon CL 6.5?
20 A. Right.
21 Q. And K-Norm, right?
22 A. Right.
23 Q. And these are all apparently brand names,
24 right?
25 A. Yes.

1 Q. Because at the very bottom we have just a broad
2 category for generic KCl, right?

3 A. Right.

4 Q. And this is under the Competing Products
5 category, right?

6 A. Right.

7 Q. Thank you, you can set that document aside.

8 Although I said that we could set the document
9 aside, I have one last question actually. If you would
10 turn to Merck-Medco page 202 in USX 131 to the first
11 page of the agreement, you'll see that the date of the
12 agreement apparently is 1st day of March 1994, correct?

13 A. Correct.

14 Q. All right, now you can set it aside.

15 Your Honor, may I approach the witness?

16 JUDGE CHAPPELL: Yes.

17 BY MR. CROWE:

18 Q. All right, Mr. Teagarden, do you have a
19 document that at the bottom right-hand corner indicates
20 it's USX 125?

21 A. I do.

22 Q. And below that, do you see a designation that
23 it's Merck-Medco 164?

24 A. Yes.

25 Q. And this is a Merck-Medco document, right?

1 A. Yes.

2 Q. And again, it's the Paid -- at least portions
3 of the Paid National Formulary, correct?

4 A. Correct.

5 MR. CROWE: Your Honor, I move for admission
6 into evidence of USX 125.

7 JUDGE CHAPPELL: Any objection?

8 MR. EISENSTAT: No objection, Your Honor.

9 JUDGE CHAPPELL: USX 125 is admitted.

10 (USX Exhibit Number 125 was admitted into
11 evidence.)

12 BY MR. CROWE:

13 Q. Sir, could you turn to page 3 of the formulary,
14 which is page 167 according to Merck's -- Merck-Medco's
15 production designation? Incidentally, this is a 1993
16 formulary, isn't it?

17 A. I don't know.

18 Q. Would you then turn to the second page of the
19 document, which is Merck-Medco 165, and do you see
20 where it says the "Updated 1993 PAID National
21 Formulary"? Do you see that?

22 A. I see that.

23 Q. All right. Then at the bottom of the page, you
24 have a copyright of 1993. Do you see that?

25 A. I see that.

1 Q. Let's go back to page 3 of the formulary, which
2 is Merck-Medco 167. You see two columns, right?

3 A. Right.

4 Q. And I'd like to draw your attention to what's
5 written under the List of Chemical Equivalents. Do you
6 see that? There's text there.

7 A. I see it.

8 Q. All right, let me focus in on that. All right,
9 you can read from your document or if it's better to
10 read from the screen, but according to the document,
11 this list is provided -- or the lists provided below
12 are the normal formulary CEQ medications and the
13 free-form text messages that are passed back to the
14 pharmacy. The text message lists the recommended
15 formulary alternatives for "CEQ" drugs, right?

16 A. You said "normal CEQ." I read that as
17 "nonformulary."

18 Q. Nonformulary, thank you.

19 Could you go to the second column, and do you
20 see at the top it says CEQ List, right?

21 A. Yes.

22 Q. And CEQ is defined right below that as chemical
23 equivalent, same active ingredients and same dosage,
24 right?

25 A. Right.

1 Q. And then you have two columns, one for Non-Form
2 CEQ. Do you see that?

3 A. Yes.

4 Q. And then you have another column for a
5 Free-Form Message, right?

6 A. Right.

7 Q. And this is a free-form message that is
8 delivered to a pharmacist, correct?

9 A. It's sent to a pharmacist.

10 Q. Thank you.

11 So, for example, let's take Leukine as an
12 example. If a pharmacist were to type in Leukine into
13 a computer, then a free-form message would be sent
14 indicating that there's a non-form alternative, and
15 that's Nordette, right?

16 A. No, the -- it would be the Prokine. You wanted
17 to start with Leukine?

18 Q. Yes, I'm sorry, thank you.

19 So, Prokine would be the free-form -- would be
20 the non-form alternative?

21 A. That's what the table indicates.

22 Q. Actually, Prokine is the form alternative,
23 right?

24 A. Right.

25 Q. And Leukine is the non-form, right?

1 A. According to this list.

2 Q. Very good.

3 If you go up two spaces, you see that there's
4 an entry for K-Dur 10 mEq, right?

5 A. Right.

6 Q. So, if a pharmacist types into the computer
7 while filling a prescription K-Dur mEq, a free-form
8 message should be sent to the pharmacist indicating
9 that the form alternatives to K-Dur 10 mEq is --
10 includes Klor Con 10 mEq, right?

11 A. Right.

12 Q. And Ten-K, correct?

13 A. Correct.

14 Q. And K-Tab, correct?

15 A. Correct.

16 Q. And Klotrix, right?

17 A. Right.

18 Q. Klor Con 10 mEq is a wax matrix potassium
19 supplement, right?

20 A. I'm not that familiar with them all anymore.

21 Q. K-Dur 10 mEq is a microencapsulated potassium
22 supplement?

23 A. That's my understanding.

24 Q. Can you please turn to page 23 of the
25 formulary, which is Merck-Medco 169, and here we have

1 another list of electrolytes in this formulary, right?

2 A. Yes.

3 Q. And you have three columns, one for a generic
4 name of a potassium product, right?

5 A. Right.

6 Q. Another for the brand name, correct?

7 A. Right.

8 JUDGE CHAPPELL: Excuse me, what is that
9 exhibit?

10 MR. CROWE: This is Exhibit USX 125.

11 BY MR. CROWE:

12 Q. Then you have a third column for the Relative
13 Cost, correct?

14 A. Right.

15 Q. And according to this list of potassium
16 products, we have liquids, right? Liquids up here.

17 A. Right.

18 Q. Then we have sustained release tablets, right?

19 A. Right.

20 Q. Then we have sustained release capsules?

21 A. Yep.

22 Q. We have effervescent tablets, right?

23 A. Right.

24 Q. And we have powders, right?

25 A. Right.

1 Q. If you go to the tablets, potassium chloride 8
2 mEq is listed, correct?

3 A. Correct.

4 Q. And then we have a listing as well for
5 potassium chloride 10 mEq, right?

6 A. Right.

7 Q. There's no listing for any potassium chloride
8 20 mEq on this formulary, correct, in tablet form?

9 A. Not listed. I don't know what the strengths
10 are of the effervescent tablets.

11 Q. Are you saying that it's possible that the
12 effervescent tablets could be 20 mEq?

13 A. I don't know, but that's possible.

14 Q. You can set that document aside.

15 Your Honor, may I approach the witness again?

16 JUDGE CHAPPELL: Yes.

17 BY MR. CROWE:

18 Q. Mr. Teagarden, do you have what at the bottom
19 right-hand corner has been designated as USX 126 in
20 front of you?

21 A. Yes.

22 Q. And at the top of the document, it says,
23 "October 1, 1993 Formulary Update," correct?

24 A. Correct.

25 Q. And if you look at the bottom of the document,

1 it indicates that it's Merck-Medco document 170, right?

2 A. Yes.

3 MR. CROWE: Your Honor, I move for the
4 admission of USX 126 into evidence.

5 JUDGE CHAPPELL: Any objection?

6 MR. EISENSTAT: No objection, Your Honor.

7 JUDGE CHAPPELL: USX 126 is admitted.

8 (Upsher Exhibit Number 126 was admitted into
9 evidence.)

10 BY MR. CROWE:

11 Q. If you look at the first page of this exhibit,
12 it appears that there is a letter written to
13 pharmacist, right?

14 A. Right.

15 Q. And it looks like it's a standard letter,
16 right?

17 A. It has that appearance.

18 Q. And according to the letter, this is informing
19 the pharmacist that there are important changes to the
20 PAID National Formulary, right?

21 A. Right.

22 Q. And these changes were introduced January 1st
23 of this year, right?

24 A. I don't know if that's the changes or if it was
25 the formulary that was introduced on January 1st.

1 Q. All right.

2 A. It could be either way. I wasn't around then.

3 Q. All right.

4 A. But I would read it either way. The formulary
5 came into being around then from my understanding.

6 Q. Fair enough.

7 Could you turn the page so that we are now on
8 USX 171, and the top of the document indicates that
9 this is the PAID National Formulary effective October
10 1st, 1993, correct?

11 A. Correct.

12 Q. And if you would go down toward the bottom of
13 the page, you see that there is a designation for
14 Formulary Alternatives to Non-Formulary Medicines. Do
15 you see that?

16 A. I see it.

17 Q. All right, I am not going to be able to get the
18 whole text of what's written below on the screen here,
19 so if you would follow me as I read from this document.
20 Do you see where it says, "For your convenience, listed
21 below are non-formulary medications and the recommended
22 formulary alternatives. As a participating pharmacist,
23 your cooperation in reminding your customers of the
24 availability of formulary alternatives is greatly
25 appreciated. You are expected to contact the

1 prescriber --" that would be the physician, right?

2 A. Any legal prescriber.

3 Q. "-- when you are presented with a prescription
4 for a non-formulary drug for which there are formulary
5 alternatives and to keep a record of the results of
6 your calls."

7 Do you see where it says that?

8 A. Yes.

9 Q. All right. Now, there are a series of columns
10 at the bottom of the page, and I'd like to draw your
11 attention to the third column, and this indicates
12 different non-formulary products, right?

13 A. Right.

14 Q. And one of the non-formulary products that's
15 listed is K-Dur 10 mEq. Do you see that?

16 A. I see it.

17 Q. And then you have formulary alternatives. Do
18 you see the column for Formulary Alternatives?

19 A. I see it.

20 Q. And right next to that you have Klor Con and
21 Klotrix. Do you see that?

22 A. I see it.

23 Q. So, according to this document, these are
24 proposed formulary alternatives to the K-Dur 10 mEq
25 non-formulary product, correct?

1 A. That's what the list suggests.

2 Q. You can set that document aside.

3 Your Honor, may I approach the witness?

4 JUDGE CHAPPELL: Yes.

5 BY MR. CROWE:

6 Q. All right, Mr. Teagarden, do you have what at
7 the bottom right-hand corner has been designated as USX
8 127?

9 A. I do.

10 Q. And it bears Merck-Medco production number 173.
11 Do you see that?

12 A. I see it.

13 Q. And the title of this exhibit is Preferred
14 Prescriptions, right?

15 A. Right.

16 Q. And if you look at the bottom of the page, it
17 says it's provided by Merck Containment Services, Inc.,
18 right?

19 A. Medco Containment Services.

20 Q. I'm sorry, Medco Containment Services, Inc.,
21 right?

22 A. Right.

23 Q. And that's Merck-Medco's predecessor, right?

24 A. Right.

25 Q. Before it was acquired by Merck

1 Pharmaceuticals, right?

2 A. That's right.

3 Q. And at the top of the page, do you see that
4 there's -- it's handwritten that it's a 1994 document,
5 right?

6 A. That's what it says.

7 Q. And if you turn the page so that we are now at
8 Merck-Medco 174, you can see that it's copyrighted in
9 1994, correct?

10 A. Correct.

11 Q. Sir, could you turn to page 24 of this
12 formulary, which is Merck-Medco page 179? Actually,
13 it's the last page of this exhibit. All right, are you
14 there?

15 A. Got it.

16 Q. All right, let's go down to Electrolytes, 15.3.
17 Do you see that?

18 A. I see it.

19 Q. And again, as with the other documents we've
20 seen, there are three columns, one for a Generic Name,
21 right?

22 A. Right.

23 Q. One for Brand Name?

24 A. Right.

25 Q. And one for Relative Cost?

1 A. Right.

2 Q. And it lists different potassium products,
3 right?

4 A. Right.

5 Q. We have liquids.

6 A. Yes.

7 Q. And we have sustained release tablets, right?

8 A. Right.

9 Q. We have sustained release capsules?

10 A. Right.

11 Q. We have effervescent tablets, right?

12 A. Yep.

13 Q. And we have powders, correct?

14 A. Um-hum.

15 Q. Let's go to sustained release tablets. We have
16 two types of products listed, right? We have potassium
17 chloride 8 mEq, right?

18 A. Right.

19 Q. And potassium chloride 10 mEq, right?

20 A. Right.

21 Q. And there's no listing for potassium chloride
22 20 mEq under the Sustained Release Tablets heading,
23 right?

24 A. Correct.

25 Q. Although there may be a 20 mEq potassium

1 product in an effervescent form or a powder form,
2 correct?

3 A. Yeah, I don't know.

4 Q. You can set that document aside, sir.

5 Your Honor, I move for the admission into
6 evidence of USX 127.

7 JUDGE CHAPPELL: Objection?

8 MR. EISENSTAT: No objection.

9 JUDGE CHAPPELL: USX 127 is admitted.

10 (USX Exhibit Number 127 was admitted into
11 evidence.)

12 MR. CROWE: Your Honor, may I approach the
13 witness?

14 JUDGE CHAPPELL: Yes.

15 BY MR. CROWE:

16 Q. Mr. Teagarden, do you have what's been
17 designated as USX 128 in front of you?

18 A. I do.

19 Q. And it bears Merck-Medco production number 180?

20 A. Yes.

21 Q. And the title is Preferred Prescriptions
22 Formulary, right?

23 A. Right.

24 MR. CROWE: Your Honor, I move for the
25 admission into evidence of USX 128.

1 JUDGE CHAPPELL: Any objection?

2 MR. EISENSTAT: No objection.

3 JUDGE CHAPPELL: USX 128 is admitted.

4 (USX Exhibit Number 128 was admitted into
5 evidence.)

6 BY MR. CROWE:

7 Q. Mr. Teagarden, at the top of the document,
8 you'll see that it indicates that it's a 1995 document,
9 right?

10 A. Yes.

11 Q. It appears to indicate that.

12 A. Yes.

13 Q. If you would turn the page, please, to
14 Merck-Medco page 181, this document is copyrighted
15 1996, correct?

16 A. Correct.

17 Q. So that it may actually be a 1996 formulary,
18 right?

19 A. I have no idea.

20 Q. I'm going to ask you to turn to the last page
21 of this exhibit, and here again, we have a listing for
22 different electrolytes, right?

23 A. Right.

24 Q. And as with the other documents we've seen, we
25 have three columns, right?

1 A. Yes.

2 Q. One for Generic Name, right?

3 A. Yes.

4 Q. One for Brand Name?

5 A. Yes.

6 Q. And Relative Cost, correct?

7 A. Correct.

8 Q. And here again, we have a listing of different

9 potassium products, right?

10 A. Right.

11 Q. We have them in liquid form?

12 A. Yes.

13 Q. Sustained release tablets?

14 A. Yes.

15 Q. Right?

16 A. Right.

17 Q. Sustained release capsules?

18 A. Right.

19 Q. Effervescent tablets?

20 A. Right.

21 Q. And powders.

22 A. Right.

23 Q. Let's focus for a moment on the sustained

24 release tablets. There's a listing for potassium

25 chloride 8 mEq, correct?

1 A. Correct.

2 Q. And a listing for potassium chloride 10 mEq,
3 right?

4 A. Right.

5 Q. There's no listing for a potassium chloride 20
6 mEq tablet product, correct?

7 A. Correct.

8 Q. And again, we don't know based on this whether
9 or not there might have been effervescent tablets in a
10 20 mEq form or powders in a 20 mEq form, correct?

11 A. Correct.

12 Q. But there may have been.

13 A. Could have been.

14 Q. All right, sir, you can set that document
15 aside.

16 Your Honor, I move for the admission of USX 128
17 into evidence.

18 JUDGE CHAPPELL: I think that's already
19 admitted.

20 MR. CURRAN: My mistake, Your Honor.

21 JUDGE CHAPPELL: Mr. Crowe, this is 1995 we
22 were just talking about. Do you have six more of
23 these?

24 MR. CROWE: No, sir, we don't have that many
25 more.

1 JUDGE CHAPPELL: Because if you have more, why
2 don't you give them to the witness all at the same
3 time?

4 MR. CROWE: I can certainly do that.

5 JUDGE CHAPPELL: I have heard no objection to
6 it, so we can move along a little bit.

7 MR. CROWE: Yes, sir.

8 JUDGE CHAPPELL: Just identify for the record
9 what you're handing him.

10 MR. CROWE: Yes, sir. Your Honor, for the
11 record, I am handing Mr. Teagarden exhibits which have
12 been designated as USX 123, USX 124 and USX 690.

13 JUDGE CHAPPELL: Any objection to these three
14 exhibits?

15 MR. EISENSTAT: I haven't seen them yet, Your
16 Honor.

17 JUDGE CHAPPELL: Mr. Crowe, you might want to
18 give them in the future to opposing counsel --

19 MR. CROWE: Yes, sir.

20 JUDGE CHAPPELL: -- before you give them to
21 co-counsel.

22 MR. EISENSTAT: That was 123, 124 and 690?

23 JUDGE CHAPPELL: Yes.

24 MR. CROWE: Yes.

25 MR. EISENSTAT: We have no objection, Your

1 Honor.

2 JUDGE CHAPPELL: USX 123, 124 and 690 are
3 admitted.

4 (USX Exhibit Numbers 123, 124 and 690 were
5 admitted into evidence.)

6 MR. CROWE: Thank you, Your Honor.

7 BY MR. CROWE:

8 Q. Mr. Teagarden, could I draw your attention to
9 USX Exhibit 123?

10 A. Got it.

11 Q. Do you have that document?

12 A. Yes.

13 Q. And this bears Merck-Medco production number
14 153, correct?

15 A. Right.

16 Q. The title of this document is Potassium
17 Supplements (8 mEq Strength), correct?

18 A. Correct.

19 Q. And below that it says, "P&T Therapeutic
20 Interchange Proposal," right?

21 A. Right.

22 Q. And above that it says or at least it indicates
23 it's a draft document, right?

24 A. Yes.

25 Q. There's a heading there for Summary of the

1 Interchange, do you see that?

2 A. Yes.

3 Q. And below that there's some text. Do you see
4 where it says, "This interchange involves contacting
5 the prescriber to consider the appropriateness of
6 substitution of the prescribed drug with the preferred
7 alternative drug (potassium chloride supplements, 8
8 mEq)"? Do you see that?

9 A. I see it.

10 Q. And there are a series of columns on this
11 document, correct?

12 A. Yes.

13 Q. Do you see under Product, it says Micro-K?

14 A. Yes.

15 Q. And there's a column for Formulation, right?

16 A. Yes.

17 Q. And according to this column, the Micro-K
18 product is a controlled release, microencapsulated
19 cap -- capsule, correct?

20 A. Correct.

21 Q. It's manufactured by Robins, right?

22 A. Yes.

23 Q. And then we have another column for other
24 products. Do you see that?

25 A. Yes.

1 Q. And we have under there K+8, do you see that?

2 A. Yes.

3 Q. We have Klor Con 8, do you see that?

4 A. I see it.

5 Q. And we have Slow-K, correct?

6 A. Correct.

7 Q. And we have a description of the formulations
8 for each of those products, correct?

9 A. Correct.

10 Q. So that the K+8 product is an extended release,
11 wax matrix tab or tablet, correct?

12 A. Right.

13 Q. And the Klor Con 8 product is a controlled
14 release, wax matrix tablet, correct?

15 A. Right.

16 Q. And the Slow-K product is a controlled release,
17 wax matrix tablet, correct?

18 A. Right.

19 Q. And this is only a proposal, correct?

20 A. Correct.

21 Q. You can set that document aside.

22 Could you turn to USX 124? Again, this is a
23 Merck-Medco document bearing production number 154,
24 correct?

25 A. Correct.

1 Q. Could you turn to the -- turn to the second
2 page of the document, and it appears that these are the
3 minutes of the Ad Hoc Pharmacy and Therapeutics
4 Committee meeting, May 3rd, 1999 that took place in
5 Montvale, New Jersey, correct?

6 A. Correct.

7 Q. And it indicates the persons who were present
8 at that meeting, correct?

9 A. Correct.

10 Q. And we have a designation for members, right?

11 A. Right.

12 Q. And it appears that that's been redacted,
13 right?

14 A. Right.

15 Q. And then we have a designation for Merck-Medco
16 representatives, right?

17 A. Right.

18 Q. And then at the bottom left-hand corner of the
19 document, we have an indication that it was
20 respectfully submitted by J. Russell Teagarden, right?

21 A. Yes.

22 Q. And that's you, right?

23 A. That's me.

24 Q. Would you turn to Merck-Medco production page
25 number 157 in this document. Now, this is describing a

1 therapeutic interchange action, correct?

2 A. Correct.

3 Q. And it indicates that the items for
4 consideration were potassium supplements 8 mEq,
5 Micro-K, K+8, Klor Con 8 and Slow-K, correct?

6 A. Correct.

7 Q. And according to the minutes of this meeting,
8 the committee concluded that the interchange among
9 these agents are clinically acceptable, correct?

10 A. Correct.

11 Q. And the action taken by the committee was to
12 approve the interchange as proposed, right?

13 A. Right.

14 Q. Now, the reason that an interchange was
15 necessary for these products is because the Micro-K
16 product was microencapsulated, while the other products
17 were wax matrix, correct?

18 A. What do you mean by "necessary"?

19 Q. Well, the P&T Committee reviewed whether or not
20 the interchange was appropriate because of the
21 different delivery -- because of the different delivery
22 forms of the products, correct? In other words,
23 these -- these products were not A-B rated, correct?

24 A. They are not A-B rated, right.

25 Q. And that's why the committee had to take this

1 action if it wanted to propose an interchange, right?

2 A. Well, we may be confusing a couple things here.

3 A-B rating has to do with sub -- whether you can
4 substitute the same entity, the same ingredient, the
5 same dosage form, the same strengths.

6 Q. Understood.

7 A. And that's when the pharmacy law allows that to
8 happen automatically.

9 Q. Okay.

10 A. So, this kind of an interchange was more
11 involved than that. Part of it was due, as you asked,
12 because of different dosage forms, yes.

13 Q. All right, you can set that document aside,
14 sir.

15 It would be fair to say, wouldn't it, that the
16 policy of Merck-Medco is to work to drive down the cost
17 to consumers of prescription medications? Would that
18 be fair to say?

19 A. Can I hear that again?

20 Q. Well, I was just asking whether or not you
21 would describe Merck-Medco's policy as being one that
22 seeks to drive down the cost to consumers of
23 prescription medications.

24 A. I wouldn't say to drive down costs of consumers
25 directly, because our customers to the business is the

1 plan sponsor. So, a lot of what we do, not entirely,
2 is to make available and/or capture certain cost
3 efficiencies of providing a prescription drug benefit.
4 Now, sometimes that means suggesting allocation
5 policies that, in fact, increase the cost to the member
6 just because of different cost share ideas. And the
7 idea of driving something down, unqualified, would not
8 be our business. We would not be driving down the cost
9 knowing it could be detrimental to them.

10 Q. Mr. Teagarden, Merck-Medco was the object of an
11 FTC investigational proceeding a number of years back,
12 correct?

13 A. Correct.

14 Q. And as a result of that investigational
15 proceeding, Merck-Medco entered into a consent decree
16 with the FTC regarding its formularies, correct?

17 A. Regarding a formulary.

18 Q. Regarding a formulary. And as a result of the
19 FTC's investigation or proceeding, Merck-Medco agreed
20 that it would create a Universal Formulary, correct?

21 A. Correct.

22 Q. And the consent decree was signed within the
23 past three or four years. Is that right?

24 A. To the best of my recollection, yes.

25 Q. Sir, you testified earlier that the formularies

1 are intended to provide the broadest range of drugs
2 relative to a drug prescription benefit, correct?

3 A. Correct.

4 Q. So, you want to make sure that patients are
5 covered for whatever pharmaceutical needs they may
6 have, correct?

7 A. No, I wouldn't say that. That's not our role.
8 Our role is to provide the pharmacy benefit management
9 services for plan sponsors who may want to do that to
10 whatever degree is consistent with their objectives to
11 providing a benefit.

12 Q. Could I draw your attention to USX 690? Now,
13 we saw two different formularies earlier today, but
14 this is a copy of the Universal Formulary that resulted
15 from Merck-Medco's consent decree with the FTC,
16 correct?

17 A. Correct.

18 Q. Now, the purpose of this Universal Formulary is
19 to have as open a formulary as possible to all plan
20 sponsors, correct?

21 A. That's not my recollection of the concept of
22 this formulary.

23 Q. Well, okay, according to the consent decree,
24 though, Merck-Medco agreed to maintain a separate open
25 formulary available to all plan sponsors.

1 A. A separate one based on that agreement. Is
2 that what you -- is that the question?

3 Q. Right.

4 A. Yes.

5 Q. And Merck-Medco as part of that consent decree
6 has to make the formulary an option during the sales
7 process, correct?

8 A. Correct.

9 Q. And as part of the consent decree, Merck-Medco
10 has also agreed to maintain a separate Pharmacy and
11 Therapeutics Committee which is self-governing,
12 correct?

13 A. That's right.

14 Q. So, the same P&T Committee that would have
15 reviewed and approved the formularies we just saw is
16 not the same P&T Committee that would review and
17 approve this formulary.

18 A. Correct.

19 Q. Could you turn to the second page of USX 690,
20 and if you look at the bottom of the page, this is
21 copyrighted 2001, right?

22 A. Right.

23 Q. Do you see that?

24 A. I see it.

25 Q. Now, as part of the consent decree, the

1 separate P&T Committee or Merck-Medco has to take the
2 open formulary and it has to submit it to the FTC,
3 correct?

4 A. Correct.

5 Q. In order to ensure that whatever is necessary
6 pursuant to the consent decree is complied with, right?

7 A. I know it's a compliance requirement, so we do
8 it.

9 Q. And it's done on an annual basis, right?

10 A. Right.

11 Q. Could you turn to page 26 of this formulary?

12 JUDGE CHAPPELL: Counsel, can you tell me the
13 relevance of the Merck consent decree to this
14 proceeding?

15 MR. CROWE: I think it will be clear as we
16 conclude our examination based on this document, Your
17 Honor.

18 JUDGE CHAPPELL: Okay, you may proceed.

19 MR. CROWE: Thank you, Your Honor.

20 BY MR. CROWE:

21 Q. If you look at the bottom of page 26, we have a
22 list of electrolyte products as well, correct?

23 A. We do.

24 Q. And we have a listing for potassium
25 bicarbonate. Do you see that?

1 A. I see it.

2 Q. A listing for effervescent potassium, correct?

3 A. Right.

4 Q. A listing for potassium chloride 8 mEq.

5 A. Yes.

6 Q. A listing for potassium chloride 8 mEq in
7 tablet form, right?

8 A. Right.

9 Q. The one before that was in capsule form.

10 A. Correct.

11 Q. We have potassium chloride 10 mEq in capsule
12 form, right?

13 A. Right.

14 Q. And we have potassium chloride 10 mEq in a
15 sustained release tablet form, right?

16 A. Right.

17 Q. We also have potassium chloride 10 percent
18 liquid.

19 A. Right.

20 Q. We have potassium citrate.

21 A. Right.

22 Q. Potassium gluconate.

23 A. Right.

24 Q. And we have powdered potassium, right?

25 A. Right.

1 Q. There is no listing here for any potassium
2 chloride 20 mEq tablet, correct?

3 A. Correct.

4 Q. And you're not aware that the FTC, after it
5 reviewed this formulary, ever complained that there was
6 no 20 mEq sustained release tablet listed, are you?

7 A. Not one that was brought to my attention.

8 Q. Now, the fact that there is no sustained
9 release 20 mEq product listed -- let me rephrase that.

10 The potassium chloride 20 mEq product or a
11 potassium chloride 20 mEq product in tablet form isn't
12 necessary to the formulary, because a doctor can simply
13 prescribe two of the 10 mEq potassium chloride tablets
14 in place of the single-dose 20 mEq tablet. Isn't that
15 right?

16 A. Are you asking me if the reason it's not there
17 is because it can be achieved by two 10
18 milliequivalents?

19 Q. Well, it can be achieved by two --

20 A. But is that the question? Are you asking me
21 why there is no 20 milliequivalent here?

22 Q. Well, you weren't involved in the negotiation
23 process with the FTC, correct?

24 A. Not negotiation.

25 Q. All right, but you realized that a doctor could

1 simply prescribe two of the 10 mEq potassium chloride
2 tablets instead of the single-dose 20 mEq tablet,
3 correct?

4 A. A physician can do that, but is the question
5 whether or not the reason a 20 isn't on there because
6 of that possibility? Is that the question?

7 Q. You've answered my question, thank you.

8 A. That's what I thought.

9 Q. Sir, let me ask you, have you ever tried the
10 Klor Con 25 powder potassium chloride product, the
11 fruit-flavored one?

12 A. Personally?

13 Q. Yes.

14 A. Not that I recall.

15 Q. Have you ever tried the potassium chloride
16 powder fruit-flavored for the 20 mEq?

17 A. No definitive recollection. I've tried a lot
18 of them, but I don't remember -- I couldn't tell you if
19 that was one of them.

20 Q. Thank you.

21 No further questions, Your Honor.

22 JUDGE CHAPPELL: Thank you, Mr. Crowe. Does
23 the counsel for Schering have any questions for this
24 witness?

25 MR. LOUGHLIN: I do, Your Honor.

1 JUDGE CHAPPELL: Have you provided any exhibits
2 you plan to offer into evidence to opposing counsel?

3 MR. LOUGHLIN: No, Your Honor, I have no such
4 exhibits.

5 JUDGE CHAPPELL: You have none?

6 MR. LOUGHLIN: No.

7 JUDGE CHAPPELL: You may proceed.

8 CROSS EXAMINATION

9 BY MR. LOUGHLIN:

10 Q. Mr. Teagarden, you're aware, aren't you, sir,
11 that there are a number of different potassium chloride
12 products?

13 A. Yes.

14 Q. And these different potassium products all can
15 be used to treat patients with potassium deficiency.
16 Is that correct?

17 A. Yes.

18 Q. And so, for example, a doctor could choose to
19 prescribe for one patient a liquid potassium chloride
20 supplement. Is that correct?

21 A. Well, not if the patient can't tolerate it.

22 Q. But for some patients, for a given patient, a
23 doctor could prescribe a liquid potassium chloride
24 product. Isn't that correct?

25 A. Could.

1 Q. Thank you, sir. And for another patient with
2 the same potassium deficiency, a doctor could choose to
3 prescribe a powder potassium chloride supplement,
4 correct?

5 A. Could.

6 Q. And for yet another patient with the same
7 potassium deficiency, a doctor could choose to
8 prescribe a tablet potassium chloride supplement,
9 correct?

10 A. On a qualified basis, yes.

11 Q. Thank you, sir. And for another patient with
12 the same potassium deficiency, a doctor could choose to
13 prescribe a capsule potassium chloride supplement.
14 Isn't that correct, sir?

15 A. Yeah.

16 Q. And in some cases, a doctor could prescribe a
17 brand name form of one of those products. Isn't that
18 correct?

19 A. Not always. There are some state -- well, some
20 state laws that require generics, but I don't recall if
21 physicians can override that. I'd have to double-check
22 on it, but there are some states that at least
23 pharmacists have to substitute, they have no choice,
24 but I think if there's a DAW on it, that they can get
25 around that. I'm not sure. That's subject to

1 individual state law.

2 Q. You're not an expert on individual state
3 pharmacy substitution laws, are you, sir?

4 A. Obviously not.

5 Q. Thank you, sir. So, you don't know, I take it,
6 or is it your testimony that, in fact, a doctor could
7 choose to prescribe a brand product and specify a brand
8 product?

9 A. They could legally. From a practice
10 perspective, they couldn't if the patient can't
11 tolerate it.

12 Q. But legally, if the patient could tolerate it,
13 the doctor could prescribe a brand name potassium
14 chloride supplement as opposed to a generic potassium
15 chloride supplement. Isn't that correct?

16 A. Could, yes.

17 Q. Thank you, sir. Now, sir, you earlier
18 described your experience as a hospital pharmacist
19 where a sales representative came to the hospital and
20 was presenting you with K-Dur product. Is that
21 correct?

22 A. Right.

23 Q. And the sales representative dropped that K-Dur
24 product into a glass of water. Isn't that correct?

25 A. Right.

1 Q. And it dissolved, and you drank it, correct?

2 A. Correct.

3 Q. And it was your belief at the time that it was
4 a significant advance because the product didn't taste
5 bad. Is that correct?

6 A. That's correct.

7 Q. Do you recall, sir, whether that was a K-Dur 10
8 tablet or a K-Dur 20 tablet?

9 A. I don't recall.

10 Q. So, it could be that it could have been a K-Dur
11 10 tablet. Is that correct?

12 A. Could have been.

13 Q. Thank you, sir. Now, sir, in your experience,
14 I take it that you're aware that brand name companies,
15 some hire sales representatives to promote their
16 products. Is that correct?

17 A. Correct.

18 Q. Thank you, sir. And it's your experience,
19 also, that brand name companies advertise their
20 products in some cases?

21 A. Yes.

22 Q. Thank you, sir. And sales representatives
23 sometimes provide free samples to doctors or hospitals
24 to provide to patients. Isn't that correct, sir?

25 A. Yes.

1 Q. And sir, are you aware that generic companies
2 typically do not employ sales representatives to
3 promote their product to doctors?

4 A. I've never encountered any.

5 Q. And I take it it's your experience that generic
6 companies typically do not provide free samples to
7 doctors to give to patients. Is that correct, sir?

8 A. I wouldn't say that's correct.

9 Q. You're aware of generic companies that provide
10 samples to doctors even though they don't hire sales
11 reps --

12 A. Yes.

13 Q. -- to go to doctors' offices?

14 A. Yes.

15 Q. Which generic companies are you aware of that
16 do that, sir?

17 A. I don't know, but Merck-Medco as a company has
18 arrangements with several, and we -- through us, we
19 sample physician offices with generics, through direct
20 mail or delivering them in person with pharmacists who
21 provide information about generic drugs.

22 Q. And that's a Merck-Medco specific program,
23 isn't it, sir?

24 A. Well, Merck-Medco does it with a certain set of
25 generic manufacturers.

1 Q. Right, and the other generic manufacturers
2 provide those free samples through or in coordination
3 with the specific Merck-Medco program. Is that
4 correct, sir?

5 A. Well, I know they do it with us. If they do
6 with it others, I don't know. They could, but --

7 Q. You're not aware of any other generic companies
8 outside of the Merck-Medco specific program providing
9 free samples to doctors to give to patients. Isn't
10 that correct, sir?

11 A. I'm not aware of any others.

12 Q. Thank you, sir.

13 JUDGE CHAPPELL: Mr. Loughlin, I know you are
14 being polite, but you don't need to thank the witness
15 after every question.

16 MR. LOUGHLIN: Thank you, Your Honor.

17 JUDGE CHAPPELL: It's okay to thank me.

18 BY MR. LOUGHLIN:

19 Q. Now, Mr. Teagarden, are you aware that the
20 level and amount of promotion and advertising that a
21 brand company does on a given brand product declines
22 after generic entry?

23 A. Yes.

24 Q. You are aware of that. Sir, are you familiar
25 with a potassium chloride product by the name of

1 Micro-K?

2 A. Yes.

3 Q. And are you aware that that product was
4 originally sold and marketed by American Home Products
5 Corporation?

6 A. No, I wasn't. I don't recall that.

7 Q. Are you aware that a generic version of Micro-K
8 was introduced by Caty Pharmaceuticals in 1987?

9 A. I don't recall, sir.

10 Q. Sir, are you aware that after a generic version
11 of Micro-K came on the market, American Home Products'
12 advertising and promotion of Micro-K declined?

13 A. I don't remember.

14 Q. Sir, you mentioned that Merck-Medco has a
15 three-tier co-pay. Is that correct?

16 A. No, we can administer a three-tier co-pay if
17 plan sponsors have a plan design that requires that.

18 Q. I take it, sir, you don't know what a given
19 plan design provides with respect to co-payments --
20 co-payment amounts for potassium chloride supplements?

21 A. I'm not sure if I understand the question.

22 Q. I believe it was your testimony that a given
23 plan sponsor may have a different plan design than
24 other plan sponsors. Is that correct?

25 A. Yes.

1 Q. And I take it that a given plan design may set
2 forth a certain co-pay amount for potassium chloride
3 products. Is that correct?

4 A. It won't be specific to potassium chloride.
5 It's more specific to dosage forms or formulary status
6 or sometimes it can be the distribution channel,
7 whether it's retail pharmacy or mail service pharmacy.
8 It -- these tiers and co-pays can be attached to a lot
9 of different things. So -- but I've never seen a
10 co-pay attached to potassium chloride because it's --
11 because it's potassium chloride.

12 MR. LOUGHLIN: Okay, thank you, sir, no further
13 questions.

14 JUDGE CHAPPELL: Any redirect?

15 MR. EISENSTAT: May we just have a moment, Your
16 Honor, and do redirect very shortly, if we could just
17 have a brief recess? We have been going for about two
18 hours.

19 JUDGE CHAPPELL: Oh, you are asking for a
20 recess not a moment to confer?

21 MR. EISENSTAT: Yes, yes.

22 THE COURT: But before we do, I want to advise
23 the attorneys, if you're going to be offering exhibits
24 through a witness that you have not already admitted,
25 please provide them to opposing counsel and to all

1 counsel before the witness testifies. Is that
2 acceptable?

3 MR. CURRAN: I'm sorry, Your Honor, even on
4 cross?

5 JUDGE CHAPPELL: Well, I think -- I think we
6 found out today that all of the exhibits would have
7 been non-objectionable to the complaint counsel. Now,
8 if you have a smoking gun you want to reserve, I
9 understand that, but I think a lot of the exhibits
10 appear to be not controversial, and I think we could
11 save everyone's time.

12 MR. CURRAN: Yes, Your Honor. There may be
13 some smoking gun type documents that we would want to
14 withhold until the moment of cross. As to other
15 documents, they were all on our trial exhibit list and
16 have been proffered for consent admission, Your Honor.

17 JUDGE CHAPPELL: All right, I understand. If
18 you have a strategic reason for withholding the
19 documents, I'm not ordering you to give them up ahead
20 of time. Is that understood?

21 MR. NIELDS: That's understood and absolutely
22 acceptable. We will try to provide the kind of notice
23 that makes the thing move faster.

24 JUDGE CHAPPELL: Okay, thank you. With that,
25 it's about 2:10, let's take a half hour mid-afternoon

1 break, recess. We are in recess. Thank you.

2 (A brief recess was taken.)

3 JUDGE CHAPPELL: Back on the record, docket
4 9297. I remind you, Mr. Teagarden, you are still under
5 oath.

6 Does the Government have any redirect?

7 MR. EISENSTAT: A few questions, yes, Your
8 Honor.

9 JUDGE CHAPPELL: You may proceed.

10 REDIRECT EXAMINATION

11 BY MR. EISENSTAT:

12 Q. Mr. Teagarden, would you get the exhibit marked
13 USX 131 out, please.

14 A. I've got it.

15 Q. Would you turn to the third page of the
16 document, the page that if you turn it sideways it's
17 headed Proposed Additions/Deletions to Paid National
18 Formulary?

19 A. I have it.

20 Q. You were asked some questions about this page
21 and the following page. Do you know anything about
22 this document?

23 A. I was not involved with these documents. I
24 can't speak to it on that level.

25 Q. Could you turn back in the document to the page

1 bearing a number at the bottom 202. It's part of an
2 agreement. Do you have that page?

3 A. I have it.

4 Q. Again, you were asked some questions about this
5 page and the following pages of the agreement. Do you
6 know anything about this agreement?

7 A. No.

8 Q. Could you turn to documents bearing the numbers
9 USX 123 and USX 124? Do you have those documents?

10 A. I have them.

11 Q. There are pages that refer to a therapeutic
12 interchange proposal. Will you explain what a P&T
13 therapeutic interchange proposal is?

14 A. Well, therapeutic interchange is an activity
15 that Merck-Medco and many other organizations, just not
16 PBMs but many types of health organizations, undertake
17 whereby we will contact a prescriber to see if it's
18 viable to change a prescription that is written to
19 another one, and it's driven by some economic
20 considerations when there's reason to believe that most
21 prescribers would be indifferent to the drugs involved
22 on a clinical basis.

23 So, there are many situations in which -- in a
24 particular category in which the drugs included are
25 considered generally interchangeable on a clinical

1 basis, yet there is -- there can be variability in the
2 costs, and so the idea is to make prescribers aware of
3 that variability in cost and to determine whether that
4 physician is indifferent to the choice on a clinical
5 basis and therefore would agree to the less expensive
6 agent.

7 Now, what this proposal is, this therapeutic
8 interchange proposal to our P&T Committee, is to
9 establish the clinical basis for general
10 interchangeability, to see if on a clinical basis we
11 could expect that there is indifference. We use our
12 independent P&T Committee to arrive at that notion of
13 general interchangeability. If they don't agree that
14 there's general interchangeability, then we do not
15 carry forward with an interchange. If they do agree,
16 then we might.

17 So, this is a case where -- and I'm not
18 involved in any of the financial elements of it, but
19 this was where apparently there would be an economic --

20 Q. Excuse me, which document are you referring to?

21 A. I am referring to USX 123, this is the
22 potassium supplement P&T interchange proposal. This
23 would be a proposal that went to our P&T Committee,
24 because apparently there was some economic benefit to
25 our plans somewhere amongst these products, and so we

1 were asking our P&T Committee if in their view, on a
2 clinical basis, whether these could be considered
3 generally interchangeable for that purpose.

4 Q. If the P&T Committee does describe that these
5 group of drugs are generally interchangeable under your
6 therapeutic interchange program, may a pharmacist then
7 automatically change a prescription from one drug to
8 the other without contacting the prescriber?

9 A. No, because there's still different products,
10 and so -- and still different prescriptions, so a
11 pharmacist still needs to get authorization from a
12 prescriber. So, what this does is just set out the
13 rationale to present to the physician, and then the
14 physician still has to authorize and effectively write
15 a new prescription for the -- for the alternative.

16 Q. Could you turn to the exhibit labeled USX 690,
17 the Merck-Medco Universal Formulary? Do you have that
18 in front of you?

19 A. I have it.

20 Q. And on page number 26, there's the list of
21 electrolytes. Do you see that?

22 A. I see that.

23 Q. And on your cross examination, it was
24 established that there's no K-Dur 20 on this list. Is
25 that right?

1 A. That's right.

2 Q. And it's -- I thought maybe you wanted to
3 answer the question and weren't given the opportunity
4 as to why there was no K-Dur 20 on the list. Do you
5 know why there's no K-Dur 20 listed here?

6 A. Yes.

7 Q. And why is that?

8 A. It's an omission.

9 Q. What do you mean, an omission?

10 A. Unwitting omission. It should be there. We
11 made a mistake.

12 Q. And how do you know that?

13 A. Well, because this -- the idea of this
14 agreement was to have a formulary that includes all the
15 drugs that are relevant to a prescription drug benefit
16 that the independent P&T said you can't have on it
17 because of some clinical reason. So, this formulary is
18 meant to list, you know, all those products that would
19 be relevant to a benefit that the P&T Committee did not
20 preclude on a clinical basis. So, the 20
21 milliequivalent formulation of that product should be
22 on here.

23 Q. On your cross examination, you described a
24 program whereby Merck-Medco provides generic samples of
25 products to physicians.

1 A. Right.

2 Q. What do you call that?

3 A. Do we have a name for it?

4 Q. Yeah, do you have a name for that?

5 A. Yeah, it's called Generics First.

6 Q. And why does Merck-Medco participate in that
7 program?

8 A. Well, as I mentioned, the plan sponsors have an
9 interest in seeing that generic formulations of drugs
10 are used as much as possible. That makes their benefit
11 more cost-efficient. So, one of the things they ask us
12 to do as their benefit manager is to expand the use of
13 generic formulations to the degree possible, and so
14 Merck-Medco, in thinking hard about all the ways it
15 could be done, thought that maybe a sampling -- since
16 we know the sampling is very effective with the branded
17 drugs, thought that sampling generic formulations might
18 be effective as well. That was the motivation, and it
19 was done, and the company has been -- has been saying
20 it's successful.

21 Q. Could you turn to the document marked USX 127
22 and also get out CX 57?

23 A. Okay.

24 Q. In USX 127, on the page number 179, page 24 and
25 it also bears the number Merck-Medco 179, there's a

1 list of electrolytes. Do you see that?

2 A. Where again, 127?

3 Q. 127.

4 A. Page 179, Merck-Medco 179, I've got that.

5 Q. Yes, and a list of electrolytes there, do you
6 see that?

7 A. Yes.

8 Q. And that indicates, I believe, that there was
9 no K-Dur 20 product on the formulary at that time?

10 A. Not listed.

11 Q. And if we turn back to CX 57, which -- did you
12 testify -- I believe you testified was the formulary
13 for prescriptions for just a different year. Is that
14 right?

15 A. Right.

16 Q. And if you turn to CX 57 --

17 JUDGE CHAPPELL: Excuse me, Counsel. Ms.
18 Bokat?

19 MS. BOKAT: Yes, Your Honor.

20 JUDGE CHAPPELL: Is there a rat in the
21 building? Do you know what the noise is, the
22 disturbance I'm getting from your side of the room?

23 MS. BOKAT: I'll see if I can find out.

24 JUDGE CHAPPELL: Thank you.

25 MS. BOKAT: It's not a rat, it's a human being

1 working with some of our documents, but we will reduce
2 the noise level.

3 JUDGE CHAPPELL: Thank you. No offense
4 implied.

5 MS. BOKAT: I don't think any was taken, thank
6 you.

7 JUDGE CHAPPELL: Okay.

8 Sorry, Counsel, you may continue. If you need
9 to repeat a question, I can have the court reporter
10 read it back.

11 BY MR. EISENSTAT:

12 Q. Let me just begin again, take a moment.

13 On CX 57, page 35, there's also a list of
14 electrolytes. Do you see that?

15 A. Yes.

16 Q. And there K-Dur 20 is listed. Is that right?

17 A. Yes, it is.

18 Q. Do you know why K-Dur 20 was added between 1994
19 and the year for CX 57?

20 A. I don't.

21 Q. But it was added to the formulary during that
22 time?

23 A. K-Dur?

24 Q. K-Dur.

25 A. Well, it was added in the brand name column,

1 but the brand names can be for reference, so like I
2 say, when we think about -- from a clinical
3 perspective, when we think about adding a drug, we
4 usually think of -- more of is it -- is it this
5 potassium formulation, independent of its brand names
6 for it.

7 Q. Okay. So, there was -- would it be more
8 correct to say that a 20 mEq extended release potassium
9 chloride was added to the electrolytes?

10 MR. CROWE: Objection, Your Honor, lack of
11 foundation.

12 JUDGE CHAPPELL: Response?

13 MR. EISENSTAT: I'm merely reading off the
14 document, that it says, "potassium chloride, extended
15 release, 20 mEq," on CX 57, and there was no such
16 listing on 1994. I'm just asking the witness if it
17 would be more correct to say that the addition was
18 simply for a 20 mEq, as it says on the document,
19 potassium chloride extended release.

20 JUDGE CHAPPELL: The objection is overruled.
21 You may answer.

22 THE WITNESS: The time interval here is
23 important, because -- because before '95, there weren't
24 great -- there weren't conventions on what was meant by
25 listing a drug on the formulary. Subsequent to '95 --

1 and I'll explain this -- subsequent to '95, there
2 became conventions, and what I mean by that is if you
3 said that you had an extended release wax matrix
4 potassium chloride on the formulary or if you had
5 potassium chloride on the formulary, it had a certain
6 meaning. It meant that liquids, immediate release,
7 conventional tablets, capsules would be on, but
8 other -- it did not mean necessarily other dosage forms
9 were on.

10 So, after '95, if there were different types of
11 dosage forms, they had to be listed separately. Before
12 that, there were no such conventions, and it's possible
13 just putting potassium chloride in the formulary could
14 have meant that anything was on. It -- so -- so,
15 before '95, the list that you see of potassium chloride
16 is not as descriptive as what it is after, if that
17 helps.

18 BY MR. EISENSTAT:

19 Q. So, in fact, K-Dur 20, even though it's not
20 listed here, may or may not have been covered?

21 A. It could have been. It could have been.

22 Q. Okay.

23 A. But it could have been meant here. I wasn't --
24 you know, I wasn't in charge of it, and I'm arriving at
25 this conclusion based on when I took over, there were

1 no such conventions, we needed those conventions so
2 that there wasn't confusion on what was meant by
3 potassium chloride in any of its dosage forms, and
4 that's why it gets more specific over time.

5 Q. On -- staying with CX 57 and the listing of
6 potassium chloride extended release K-Dur 20 mEq, do
7 you see that listing under Electrolytes?

8 A. Yes.

9 Q. And there's two dollar signs in the Relative
10 Cost column?

11 A. Correct, yes.

12 Q. And when you answered questions earlier about
13 the relative cost, you made it clear that that was the
14 relative cost at the time this document was prepared.
15 What did you mean by that?

16 A. Well, I don't -- what I mean is that I don't
17 know what it is today now that there's a generic
18 formulation on the market.

19 Q. So, the relative cost could be different today?

20 A. Could be.

21 JUDGE CHAPPELL: Mr. Eisenstat, I need to
22 interrupt you. We are going off the record.

23 (Discussion off the record.)

24 JUDGE CHAPPELL: Just to be clear, let me just
25 call -- let's take a ten-minute recess. Thank you.

1 (A brief recess was taken.)

2 JUDGE CHAPPELL: Back on the record, docket
3 9297. You may proceed, Mr. Eisenstat.

4 BY MR. EISENSTAT:

5 Q. On your cross examination, you were asked a
6 series of questions by Mr. Loughlin dealing with what
7 types of potassium chloride products a doctor could
8 prescribe for a patient. Do you recall that?

9 A. Yes.

10 Q. And you said it depended kind of on patient
11 tolerability. Do you recall that?

12 A. Yes.

13 Q. Could you explain that, please?

14 A. Well, asking "could" requires a qualification
15 as to whether they have a right by law to prescribe it
16 and whether they could according to what would be good
17 practice. So, if you take an approach of could you
18 prescribe it as a matter of good practice to somebody
19 who really can't tolerate it or refuses to take it, I
20 would say no.

21 MR. EISENSTAT: I have no further questions,
22 Your Honor.

23 JUDGE CHAPPELL: Is there any recross based
24 upon the redirect?

25 MR. CROWE: Yes, Your Honor.

1 RECROSS EXAMINATION

3 Q. Sir, in your redirect, did you say that the
4 exclusion of a 20 milliequivalent potassium chloride
5 tablet was an omission on the Universal Formulary?

7 Q. Sir, do you remember when at your deposition in
8 October about that very same formulary, you were asked:

13 "ANSWER: As a single unit dosage form, there
14 is not.

19 "ANSWER: Yeah."

21 A. Right.

23 JUDGE CHAPPELL: Any recross from Schering, Mr.
24 Loughlin?

1 JUDGE CHAPPELL: You may proceed.

2 RECROSS EXAMINATION

3 BY MR. LOUGHLIN:

4 Q. Mr. Teagarden, how many customers use the
5 Universal Formulary?

6 A. Zero.

7 Q. And you also testified in response to one of
8 Mr. Eisenstat's questions regarding the good practices
9 of prescribing. Do you recall that?

10 A. Yes.

11 Q. All right. You're not a doctor, are you, sir?

12 A. No.

13 MR. LOUGHLIN: Thank you, sir. No further
14 questions.

15 JUDGE CHAPPELL: Anything further?

16 MR. EISENSTAT: We have nothing further, Your
17 Honor.

18 JUDGE CHAPPELL: Thank you for your time, Mr.
19 Teagarden. You're excused.

20 Would the Government call its next witness,
21 please?

22 MS. BOKAT: Your Honor, what we would like to
23 do this afternoon would be to do some of the live
24 readings from previously admitted investigational
25 hearing or deposition transcripts.

1 JUDGE CHAPPELL: That's fine. It's your case.

2 MS. BOKAT: Thank you. On behalf of --

3 JUDGE CHAPPELL: Do you have a mobile mike on?

4 You seem to project from everywhere in the room.

5 MS. BOKAT: Would you prefer that I go back

6 there and not intimidate --

7 JUDGE CHAPPELL: No, you just sounded like you

8 were wired every time you spoke.

9 MS. BOKAT: Well, I find the acoustics in this

10 courtroom to be atrocious. Half the time I can't hear.

11 So, I was trying to project so the other people

12 wouldn't be in the same situation.

13 JUDGE CHAPPELL: Okay. So, you're going to

14 identify the person who will be reading? What's your

15 plan? Are you going to read it yourself?

16 MS. BOKAT: No, Your Honor, I would like to

17 introduce with your permission two of complaint

18 counsel, Mr. Andrew Ginsburg, who will be reading the

19 questions that were posed by the lawyer, and Ms. Yaa

20 Apori, who will read the portion from the witness.

21 JUDGE CHAPPELL: Okay.

22 MS. BOKAT: Now, we have this afternoon a

23 series of excerpts about the negotiations between

24 Upsher-Smith and Schering-Plough leading to their

25 agreement. These readings come from several different

1 witnesses. One, Mr. Ian Troup, president of
2 Upsher-Smith; Martin Driscoll, who was vice president
3 of sales and marketing for Key Pharmaceuticals, the
4 subsidiary of Schering responsible for K-Dur 20; Raman
5 Kapur, head of Schering's generic unit; John Hoffman,
6 in-house counsel for Schering-Plough; and Jeffrey
7 Wasserstein, who at the time of the agreement was vice
8 president of business development.

9 Your Honor, we have grouped these readings
10 about the negotiations by topic. For example, there's
11 a series of readings about a particular meeting. Those
12 readings may come from more than one witness. What we
13 would like to do is be permitted to read the portions
14 about a topic, for example, a meeting, within one
15 group, and then have respondents' counsel do their
16 counter-readings on that group before we move to the
17 next group.

18 JUDGE CHAPPELL: Do you -- have the attorneys
19 agreed to this?

20 MS. BOKAT: We've discussed it, but we weren't
21 able to reach agreement. I said that I'd be willing to
22 raise the issue, but I do not wish to speak for
23 respondents' counsel.

24 JUDGE CHAPPELL: Okay. Ms. Shores?

25 MS. SHORES: Your Honor, as I understand it,

1 what complaint counsel wants to do is to read their
2 designations from several different witnesses on a
3 particular topic and wait until they have finished
4 their designations on that topic before reading or
5 having read any of our counter-designations, and what I
6 had anticipated that they would be willing to do or
7 what Your Honor had ruled was that, for example, if
8 they read from the deposition of Martin Driscoll, a
9 Schering witness, they leave out a question and answer
10 that we have counter-designated, I would like to have
11 that read in the -- in the order in which it appears in
12 the transcript as opposed to waiting to some later
13 point in which it will be completely out of context by
14 the time we are able to have it read.

15 JUDGE CHAPPELL: The way I'd like to proceed is
16 as close to live as possible, and the way that would
17 work is the Government can read the Qs and As they
18 want, and then I want -- I want you to read all the Qs
19 and As you have for a certain witness, and then I am
20 going to allow opposing counsel to enter your Qs and
21 As. That way we're not jumping around so much, and I
22 know it's not going to flow as well, but we're not
23 going to recreate the deposition here.

24 Now, is it my understanding that you are
25 planning to -- pick a witness, that Mr. Driscoll, that

1 you are going to read some of his deposition and then
2 come back later and read more of his deposition?

3 MS. BOKAT: Yes. In order to try and present a
4 clear picture to the Court, we thought that it would
5 make sense to do these readings by topic or theme. In
6 other words, talk about the particular meeting, and I
7 guess what we'll have, for example, if the first group
8 was about the May 21st meeting, we would have readings
9 from Mr. Troup, Mr. Driscoll.

10 My understanding of the Court's immediate
11 ruling is that we would read what we have for Mr.
12 Troup, then respondents' counsel would be permitted to
13 read their counter-readings on Mr. Troup, and we would
14 move to Mr. Driscoll. Now, the testimony of Mr.
15 Driscoll about a particular meeting goes over several
16 pages.

17 JUDGE CHAPPELL: Does the -- do the respondents
18 object to the piecemeal presentation of the direct
19 testimony?

20 MS. SHORES: Your Honor, it seems --

21 JUDGE CHAPPELL: I mean, if the parties can
22 agree, I don't have a strong feeling, so just let me
23 know what you can agree to.

24 MS. SHORES: Again, without revisiting your
25 prior ruling, I think that I had agreed with complaint

1 counsel -- it's not the way that I would do it, but if
2 they would like to skip around among witnesses on a
3 particular topic, I think that it was Schering's
4 position that that was permissible. Again, what I was
5 concerned about is the strangeness of reading my, you
6 know, two lines of counter-designation about something
7 long after the context in which it was actually
8 happened was clear. I mean, I can give Court an
9 example.

10 There's a discussion in Mr. Driscoll's
11 testimony about Mr. Troup having said something to Mr.
12 Driscoll. What they have omitted from their
13 designations is what Mr. Driscoll asked in response.
14 It will be very strange if I'm not permitted to read
15 that until after you have heard the rest of Mr.
16 Driscoll's testimony, either on that topic or more than
17 one topic.

18 MR. CURRAN: I have some objections to make as
19 well, Your Honor.

20 JUDGE CHAPPELL: Ms. Shores, couldn't you put
21 that in context by reading, in addition to what you
22 want, the Q & A before that?

23 MS. SHORES: I could. It might mean a slight
24 repetition, and I would be perfectly happy with that.

25 JUDGE CHAPPELL: Let me hear Mr. Curran. He's

1 been standing there a while. What do you think?

2 MR. CURRAN: Thank you, Your Honor. I have at
3 least two points to make, Your Honor.

4 One relates to the following: I accept your
5 rulings on the motions in limine, of course, I
6 understand them and accept them, but in some
7 jurisdictions, it's appropriate to renew objections
8 during the trial so as to assure that there's not a
9 waiver for reasons of appellate law. So, for that
10 reason, I renew my objection to the use of
11 investigational hearings against Upsher-Smith at this
12 trial.

13 JUDGE CHAPPELL: Well, no, you don't need to do
14 that, because my ruling on that is in the record as to
15 the reasons why I did it. So, that is not an objection
16 you need to renew.

17 MR. CURRAN: Thank you, Your Honor.

18 My second point is, as has already become
19 evident here, complaint counsel seeks to read from the
20 investigational hearing of Mr. Driscoll and certain
21 other witnesses not as to statements that they
22 themselves are making but instead they are in these
23 investigational hearing transcripts reporting on what
24 Mr. Troup said. So, if I understood your ruling
25 yesterday correctly, when you said -- and I have the

1 transcript here -- you said that the investigational
2 hearings are admissions, "that means only to be used
3 against the party who uttered the statement," and you
4 went on to admonish counsel, "I do not want anyone
5 citing to a statement from a Schering-Plough witness in
6 one of these hearings to be used against Upsher-Smith."

7 JUDGE CHAPPELL: That's what I meant.

8 MR. CURRAN: Right. I believe that what
9 complaint counsel intends to do here today defies that
10 ruling, because I think what they're trying to do here
11 today is precisely what Your Honor prohibited. They
12 are trying to read from an investigational hearing of
13 Mr. Driscoll at which Upsher-Smith was not present and
14 had no opportunity to refresh recollection or cross
15 examine, and they are seeking to have that admitted
16 necessarily against Upsher-Smith. There is no reason
17 why they would have to read that if it only related to
18 their case against Schering-Plough.

19 So, I'm --

20 JUDGE CHAPPELL: Well, if you're correct, then
21 when we're -- when we're through, then you can make
22 that objection. If -- it's like the co-conspirator
23 ruling I made. This is going to have to be tidied up
24 at the end of the hearing, of the trial, because unless
25 they meet all the requirements under the co-conspirator

1 rule, anything that may have been said in Court, read
2 in Court or offered into evidence is conditional. It's
3 conditionally admitted. And if it's a party admission
4 by Schering, that's why it's coming in. It's not
5 coming in against your client.

6 MR. CURRAN: Okay. I -- I understand -- I
7 think I understand the co-conspirator admission rule,
8 and I understand that that would allow Mr. Driscoll
9 live in this Court to say what Mr. Troup told him
10 during negotiations --

11 JUDGE CHAPPELL: No, the co-conspirator rule is
12 defined as nonhearsay.

13 MR. CURRAN: Right, but what I'm saying is the
14 Driscoll transcript is hearsay, and unless the Driscoll
15 transcript is admissible, you don't even get to the
16 question of the co-conspirator rule.

17 JUDGE CHAPPELL: The Driscoll transcript is not
18 hearsay as to Driscoll's employer.

19 MR. CURRAN: Correct, agreed. So, therefore,
20 the Driscoll transcript can only be read against
21 Schering-Plough.

22 JUDGE CHAPPELL: That's my ruling. It can't be
23 used against Upsher-Smith. It's a party admission by a
24 party. It doesn't cross the line.

25 MR. CURRAN: Agreed. I've read what's been

1 designated by complaint counsel --

2 JUDGE CHAPPELL: And I know you're telling me
3 that there's no -- I think you said no reason in the
4 world they would read it other than to taint or
5 besmirch our client, but I don't know what they're
6 doing. It's their case. I don't think any of us know
7 until this is over, and that's why I made the ruling
8 the way I did. Before it's all said and done, we are
9 going to decide what's admitted and what's not and
10 against whom it will be admitted.

11 MR. CURRAN: Very good, Your Honor.

12 JUDGE CHAPPELL: Now, do you object to reading
13 parts of Driscoll's testimony and then coming back to
14 Driscoll later?

15 MR. CURRAN: I do. The parties -- the
16 respondents have designated I believe short additions
17 at the beginning and end -- well, in our case, in all
18 instances, just to put into proper context the
19 testimony designated by complaint counsel. To me, it
20 doesn't make sense to have complaint counsel read their
21 excerpts and then have us out of context read what
22 should have been read in the original context. That
23 would make the whole thing disjointed and confusing.

24 JUDGE CHAPPELL: What we are going to do, first
25 of all, the Government needs to make very clear on the

1 record when you begin whether you're reading from an
2 investigational hearing transcript or a deposition, and
3 I think as far as piecemealing, categorizing the
4 testimony, that's what briefs are for. When you
5 call -- when you read Mr. Driscoll's testimony, I want
6 you to finish Mr. Driscoll's testimony.

7 Now, I don't mean the deposition and the
8 hearing transcript, the investigational hearing
9 transcript, but when you read from his deposition, I
10 want the Government to read all you're going to, and
11 then I will hear the counter-designations at that time
12 from that witness, and that witness is then off the
13 table. Understood?

14 MS. BOKAT: May I ask one clarification, Your
15 Honor? We've prepared a segment of about 45 minutes of
16 this afternoon, trying to figure out how much time we'd
17 have at the end of the live witness, which covers the
18 negotiations. We do not have ready and we haven't
19 given respondents detailed notice yet of the excerpts
20 about due diligence and some other topics. So, we
21 would be fully prepared to do the readings on
22 negotiations for -- all of them for Mr. Troup and then
23 move on to another witness.

24 JUDGE CHAPPELL: And then come back to Mr.
25 Troup?

1 MS. BOKAT: Then on another day be -- do the
2 rest of the readings on all other topics other than the
3 negotiations, and that might entail coming back to Mr.
4 Troup.

5 JUDGE CHAPPELL: And that's like taking a
6 witness -- taking part of a testimony and then bringing
7 him back a week later. It's just not the way it's
8 done, Ms. Bokar. Now, if you're telling me that you
9 have 45 minutes, and I assume that the respondents have
10 some cross, that's going to get us past 4:00, and maybe
11 we will end for the day then, and maybe because I just
12 made the ruling today, I will allow you this one
13 exception. You will need to complete Mr. Troup,
14 though, first thing in the morning, whatever you want
15 to designate for Mr. Troup.

16 MS. BOKAT: Now, that again raises the question
17 of notice to respondents, and I'm wondering if in
18 fairness, rather than starting the readings this
19 afternoon, we should do them at a later date.

20 JUDGE CHAPPELL: Well, just so I'm clear, are
21 respondents objecting or not objecting to taking
22 certain topics out of a deposition and then coming back
23 to it later?

24 MS. SHORES: Your Honor, it -- it strikes me as
25 odd. I mean, frankly, I -- I had assumed that what

1 they were going to do was to put on a witness as if the
2 witness were here live and we would have them cover
3 one -- you know, everything he's going to cover. The
4 one caveat for that is, as we explained I believe at
5 the very beginning of the trial, there -- because
6 they've essentially brought two cases, one related to
7 Upsher and one related to ESI, we will be having
8 witnesses come before you live twice in order to
9 preserve some coherence between those two topics.

10 So, I don't want to -- I think that's why I was
11 a little bit more accepting of what Ms. Bokat had
12 proposed than I might otherwise be. I had not --

13 JUDGE CHAPPELL: So, respondents are also,
14 then, intending to call witnesses twice?

15 MS. SHORES: Well, just twice, not -- and not
16 broken down into little mini-topics on the various
17 cases, but in other words, we were going to present
18 the -- our defense to the ESI case first and then
19 present our defense to the Upsher case first -- second,
20 and there are witnesses who are involved in both of
21 those negotiations. So, I wanted to make clear for the
22 Court that, you know, to some degree, we are going to
23 be dividing things up by those two broad topics.

24 I had not intended, of course, to have
25 witnesses on and off the stand testifying about a

1 particular meeting and then having, you know, Mr.
2 Driscoll, he would -- you know, if we divided it up the
3 way they're doing it, he would be on and off eight
4 times. I certainly had not intended to do that.

5 JUDGE CHAPPELL: Is Upsher-Smith also going to
6 have any divided testimony?

7 MR. CURRAN: No, Your Honor. Now, we would not
8 object if complaint counsel wanted to put on a witness
9 about the Upsher-Smith agreement and then a separate --
10 and then later about the ESI agreement. That sort of
11 division would be acceptable, because this is
12 essentially two different cases brought together.

13 However, I don't think it's proper for there to
14 be sections or certain excerpts of, for instance, Mr.
15 Troup and then at a subsequent point in time additional
16 excerpts. To me, that essentially constitutes a
17 cutting and pasting job from the depositions and
18 investigational hearings that is not appropriate in a
19 trial setting.

20 JUDGE CHAPPELL: How many ways have you sliced
21 Mr. Troup's testimony, the different agreements -- I
22 mean, you told me about negotiations. What other
23 topics do you plan to introduce?

24 MS. BOKAT: In -- once we get beyond the
25 negotiations, we were going to talk about the

1 negotiations of the Niacor license and the due
2 diligence on Niacor. I'm not proposing that we do
3 separate day readings on each of those. What I am
4 suggesting now in light of Your Honor's rulings this
5 afternoon is that we could do it in two segments. We
6 could do one today on negotiations and a second segment
7 another day on everything else.

8 JUDGE CHAPPELL: Well, it seems to me to be
9 fair if the respondents -- if Schering intends to
10 introduce their case that way, their case in chief, and
11 if Mr. Curran does not object, then I will allow the
12 Government to introduce the deposition testimony at
13 least sliced in two, and because of the ruling today --
14 and this is pretty much a moving target, I think, the
15 way we're working with these transcripts, so I'm trying
16 to be understanding.

17 Are you prepared to present -- you've got the
18 negotiating part of the excerpt ready to go?

19 MS. BOKAT: Yes, Your Honor.

20 JUDGE CHAPPELL: Okay, and so for -- and for
21 Mr. Troup, right?

22 MS. BOKAT: Yes.

23 JUDGE CHAPPELL: Okay. Is it going to be clear
24 and easy to do for you to present Mr. Troup as to
25 negotiations, then everything else?

1 MS. BOKAT: May I have one minute to confer
2 with my two lawyers who are doing the readings and make
3 sure I give you an accurate answer to that question,
4 Your Honor?

5 JUDGE CHAPPELL: Yes, you may.

6 MS. BOKAT: Thank you.

7 (Counsel conferring.)

8 JUDGE CHAPPELL: Ms. Bokat?

9 MS. BOKAT: Yes, Your Honor, we could this
10 afternoon read everything we have for Mr. Troup about
11 negotiations, and then read everything from Mr.
12 Driscoll about negotiations and then everything from
13 Mr. Kapur about negotiations and similarly with the
14 other two witnesses.

15 JUDGE CHAPPELL: Okay, and are you going to be
16 hard-pressed to retool your readings as to group one
17 reading versus respondent Schering-Plough and group two
18 versus respondent Upsher-Smith? Not the negotiation
19 part, I mean beyond -- after that.

20 MS. BOKAT: I'm sorry, Your Honor, after the
21 negotiation part, the readings we do on a subsequent
22 day, is that what we're talking about now?

23 JUDGE CHAPPELL: Right, and where I'm leaning
24 is that to the extent I'm going to allow you to break
25 it up, you get two shots. You get a shot at Schering

1 and a shot at Upsher and no more sub-topics.

2 MS. BOKAT: Right, so that on the second day
3 readings --

4 JUDGE CHAPPELL: I'm sorry, is it AHP?

5 MR. CURRAN: That's what we've been calling it,
6 Your Honor, yes.

7 JUDGE CHAPPELL: Okay. Are we talking about an
8 AHP witness? I thought we were talking about a
9 Schering-Plough witness. Who's Mr. Troup? I --

10 MS. BOKAT: He's an Upsher-Smith witness.

11 MR. CURRAN: Mr. Troup is an Upsher-Smith
12 witness, yes, Your Honor, and he's here today.

13 MS. BOKAT: Now, I may be hopelessly confused,
14 so I am going to try to answer the question --

15 JUDGE CHAPPELL: I think we all may be. Let's
16 reset.

17 I was following the road that Ms. Shores placed
18 me on, but -- not that that's wrong, but you were
19 talking about defending the claims against you and then
20 defending the claims against you regarding AHP. Did I
21 misunderstand you?

22 MS. SHORES: No, all I was trying to point out
23 was to be fair to complaint counsel, that while I
24 regard this dividing up into topics as strange, I
25 didn't want the record to be unclear. We intend to

1 present our proof all about AHP and that agreement
2 first and then all about Upsher and that agreement
3 second. I think that what she intends to have read
4 today all relates to the Schering-Upsher negotiation
5 and has nothing to do with AHP, as I understand it.

6 JUDGE CHAPPELL: Well, I think what I'm going
7 to do, if the parties can keep it straight, go for it.
8 We're going to have a record, it's going to be on
9 there. If something slips from -- between the cracks,
10 it's not my fault.

11 MS. BOKAT: Okay, and Your Honor, if the way
12 this is unfurling does not meet with the Court's
13 pleasure, please let me know, we will stop for the day
14 and continue at a later time consistent with the way
15 you want it to unfurl.

16 JUDGE CHAPPELL: Well, I think how it's going
17 to unfurl is you are going to be able to try your case
18 the way you want to try it, Ms. Bokat. I'm not going
19 to tell you what to do. I'm not going to tell anybody
20 what to do. I'm going to tell you what you can and
21 can't do, but we are going to have a record, and I
22 think some of this is alleviated by the fact -- not
23 alleviated, but it's helped by the fact that these
24 are -- what did you call them, Ms. Shores, snippets --
25 taken from depositions or exhibits that are in

1 evidence. Is that correct?

2 MS. BOKAT: These are in evidence, yes, Your
3 Honor.

4 JUDGE CHAPPELL: Okay, Lord help us all with
5 that record, but -- okay, we are going to have -- we
6 are going to have post-trial briefs, and that's when
7 the parties are going to have to marshal the evidence
8 and try to, you know, point out things -- I believe
9 that's your goal, is to point out things to me in the
10 post-trial brief. If the parties can keep it straight,
11 then I'm okay with it. So -- and it sounds like that
12 you've been working toward what to expect and how to
13 respond. The only -- the only adjustment I am making
14 is -- and then we go to the second problem, and that is
15 when they read a Q and A and there was an objection, do
16 you want to read your objection at that time? I don't
17 think -- I think that's too much jumping up and down.

18 MS. SHORES: I don't think we have any
19 objections.

20 JUDGE CHAPPELL: Okay, and -- well, if you
21 do -- what I want to do is, Mr. Troup -- Mr. Troup's
22 testimony is going to be read. Then I'm going to allow
23 the respondents to read whatever designations they've
24 made regarding Mr. Troup. Feel free to read the
25 preceding Q and A to put it in context just like you

1 would if the witness were here live. Mr. Blank, didn't
2 you say in response to his question -- you know, so we
3 can all make some sense out of it. And I understand
4 your concerns, and they're my concerns also. So, let's
5 please try to make a record that makes sense, and
6 that -- one of my jobs is to make sure our record is
7 clear, so we're all -- you know, we all have the same
8 agenda here.

9 With that, the only other -- the only other
10 point I want to make regarding this, you need to have
11 your people who are doing the reading and responsive
12 reading, you need to make clear for the record who the
13 witness was or is, and again, I don't want the
14 investigational hearing transcript mixed up with the
15 deposition. I want a clean break there.

16 Any other questions?

17 MS. SHORES: Your Honor, and as I understand
18 it, at the end of the readings on Mr. Troup, we will
19 present our counter-designations on Mr. Troup, and then
20 we'll move on to the next witness and so forth?

21 JUDGE CHAPPELL: Yes.

22 MS. SHORES: Okay. Thank you, Your Honor.

23 JUDGE CHAPPELL: Any other questions?

24 MS. BOKAT: No, Your Honor.

25 JUDGE CHAPPELL: Does everyone understand where

1 we're going?

2 MS. SHORES: Got it.

3 MR. CURRAN: I believe so, Your Honor.

4 JUDGE CHAPPELL: Okay, thank you. You may
5 proceed.

6 MS. BOKAT: Thank you, Your Honor.

7 JUDGE CHAPPELL: Off the record, the court
8 reporter has something she wants to talk with you
9 about.

10 (Discussion off the record.)

11 JUDGE CHAPPELL: Back on the record.

12 I need to ask another question. Are there
13 going to be any excerpts read from exhibits that aren't
14 already admitted into evidence?

15 MS. BOKAT: No, Your Honor.

16 MR. GINSBURG: Good afternoon, Your Honor.
17 Would you like a copy of the transcript as we read
18 them?

19 JUDGE CHAPPELL: I don't need it, but the court
20 reporter does.

21 MR. GINSBURG: We have one.

22 (Discussion off the record.)

23 MR. GINSBURG: We will now be reading from the
24 testimony of Mr. Ian Troup, from his investigational
25 hearing of May 25th, 2000, page 87, line 16.

1 "QUESTION: Okay. Was it you that
2 initially approached Schering about a possible
3 settlement?

4 "ANSWER: Yes.

5 "QUESTION: Do you approximately know
6 when you made that approach?

7 "ANSWER: It was done by telephone a few
8 days prior to my initial visit on 5/21. I
9 believe it would have been three or four days
10 prior to that.

11 "QUESTION: Do you remember who you spoke
12 to?

13 "ANSWER: I think I was eventually put
14 through -- I was asking for someone more
15 senior, but I was put through to Marty
16 Driscoll. It was he that I met on 5/21.

17 "QUESTION: What did you say to Mr.
18 Driscoll?

19 "ANSWER: I'm sorry?

20 "QUESTION: What did you say to Mr.
21 Driscoll?

22 "ANSWER: I said we're going to win this
23 case, and we're going to come onto the market,
24 and if we come onto the market, it could open
25 up a flood gate of products, and we'll sell --

1 we'll do very well, but I was posturing. I
2 was negotiating. I was hoping that they were
3 getting as tired of the fight as I was. And I
4 was hoping that they were as unsure of the
5 outcome as I was. If they were, then there
6 was, as in all litigation, never mind how
7 tough it is. There might be some hope of a
8 negotiation of when we could come to the
9 market before that 2006.

10 "QUESTION: When you say open the flood
11 gates, what do you mean by that?

12 "ANSWER: If we got onto the market and
13 other people would have come onto the market
14 at different times.

15 "QUESTION: Other people would come on
16 the market with a generic version of the K-Dur
17 20?

18 "ANSWER: Yes."

19 MR. GINSBURG: Page 100, line 20:

20 JUDGE CHAPPELL: Let me ask you something:
21 Have you designated the portions of the transcript
22 where the witness identifies themselves and tells me
23 who they are and who they work for?

24 MR. GINSBURG: It's my understanding that we
25 have, although I can't say for sure.

1 JUDGE CHAPPELL: I'm not sure I heard it just
2 now. I don't -- Mr. Troup could be anybody from
3 anywhere from what I just heard.

4 MS. BOKAT: May I answer the question, Your
5 Honor?

6 In the full universe of our designations, we
7 did designate those portions. We are reading a subset
8 from the universe, and the readings may not always
9 include the initial page where the witness is
10 identified and then the certification page at the end,
11 but those are in the exhibit that is the designations
12 from that transcript.

13 JUDGE CHAPPELL: Okay, when someone is going to
14 read an excerpt, please identify the person and who the
15 party is or who they worked for, and if it's misstated,
16 the opponent should object and let me know. How's
17 that? Could you do so for this witness? Is that okay
18 with you, Mr. Curran?

19 MR. CURRAN: Yes, I was standing up to say I
20 agree, Your Honor.

21 JUDGE CHAPPELL: Thank you. So, can you please
22 tell me who this is and who they're with, what their
23 job is?

24 MR. GINSBURG: This is Ian Troup with
25 Upsher-Smith.

1 JUDGE CHAPPELL: Position?

2 MR. GINSBURG: It's my understanding he's the
3 president of Upsher-Smith, but I don't --

4 MR. CURRAN: He's the president and chief
5 operating officer, Your Honor, and he's sitting behind
6 me right now.

7 JUDGE CHAPPELL: I think that's clear enough.
8 Thank you, Mr. Curran.

9 Okay, you may proceed.

10 MR. GINSBURG: Thank you, Your Honor. Page
11 100, line 20:

12 "QUESTION: Just so I'm clear, with
13 respect to the licenses, the possible licenses
14 that were introduced in the negotiations, were
15 any specific products discussed in which
16 Upsher-Smith would license to Schering during
17 the June 3rd meeting?

18 "ANSWER: I don't believe so. I believe
19 that was June 12th when I first -- he did ask
20 what products we did and what products we had
21 under development.

22 "QUESTION: Do you remember how many
23 products you discussed with him?

24 "ANSWER: I would have told him what
25 products we had and what products were under

1 development, what I thought were interesting
2 products. The specific product discussion
3 took place, as I remember it, on the 12th and
4 we discussed a number of products."

5 MR. GINSBURG: Page 103, line 16:

6 "QUESTION: Can you describe what was
7 said during the June 12th meeting?

8 "ANSWER: It was during that meeting that
9 the subject of Niacor-SR was brought up, and I
10 rather jumped at that because that was going
11 to give me the opportunity of solving another
12 problem in the company, the further
13 development of this product, particularly
14 someone to look after the product in Europe.
15 And they seemed very interested in it on the
16 basis of the public information that Kos was
17 hoping to make it a very important product for
18 them. They asked me how far we were with the
19 development, how long we'd been doing it and
20 some minor details like how much we had spent
21 on it so far."

22 MR. GINSBURG: Page 118, line 24:

23 "QUESTION: After this June 12th meeting,
24 you referred to several phone calls where you
25 were negotiating some other terms. Who was

1 involved in those phone calls?

2 "ANSWER: Just myself and then latterly,
3 at the eleventh hour, the very last phone call
4 that was made, my attorney was on a conference
5 call. I was on one conference call. He was
6 on the other line. And there were two parties
7 on from Schering-Plough, and I believe they
8 were also in separate locations all
9 conferencing in. Mr. Kapur in one and I got
10 the impression their attorneys were in a
11 different venue. John Hoffman was the name I
12 couldn't remember earlier. Mr. Hoffman I
13 think was involved.

14 "QUESTION: He was involved in the phone
15 conversations. Was he involved prior to the
16 phone conversations?

17 "ANSWER: He was one of the people who
18 was at that meeting I referred to that I --

19 "QUESTION: The June 12?

20 "ANSWER: Like I said, it was several
21 people. That's the only name I now recall.

22 "QUESTION: Were there drafts of the June
23 17 agreement that were created?

24 "ANSWER: Yes. We were working from
25 drafts during that last telephone

1 conversation.

2 "QUESTION: Who had drafted it?

3 "ANSWER: All the drafting came from
4 Schering-Plough and they were sending them --
5 we were working with documents. They sent
6 them by fax.

7 "QUESTION: You sent them by fax?

8 "ANSWER: They were sending them to me by
9 fax."

10 MR. GINSBURG: That concludes, Your Honor, our
11 readings from Mr. Troup's investigational hearing.

12 JUDGE CHAPPELL: Okay. Does Schering-Plough
13 have any counter-designations?

14 MS. SHORES: We do not, Your Honor.

15 JUDGE CHAPPELL: Okay, Upsher-Smith?

16 MR. CARNEY: Yes, Your Honor.

17 MR. CURRAN: Mr. Carney and Mr. Stone will
18 re-enact this.

19 JUDGE CHAPPELL: Okay.

20 MR. CURRAN: Thank you, Your Honor.

21 JUDGE CHAPPELL: Did you give a copy to the
22 court reporter?

23 MR. CARNEY: No, I have not, but I think she'll
24 be able to follow along in the one that complaint
25 counsel provided.

1 (Discussion off the record.)

2 MR. CARNEY: Your Honor, this is a
3 counter-designation to the first reading. It's from
4 Mr. Troup's investigative hearing, May 25, 2000. It
5 starts at page 88, line 24, but I will read the
6 preceding question, which begins at line 21.

7 "QUESTION: Other people would come on
8 the market with a generic version of the K-Dur
9 20?

10 "ANSWER: Yes.

11 "QUESTION: Was there a connection
12 between Upsher-Smith's being on the market
13 with a generic version of K-Dur 20 and other
14 people on to the market with a generic version
15 of that product?

16 "ANSWER: Not a specific.

17 "QUESTION: Did you explain to Mr.
18 Driscoll the possible effects Upsher-Smith's
19 entry with this Klor Con M20 product would
20 have on Schering's K-Dur 20?

21 "ANSWER: Yes. I tried to get him to
22 accept that we would do pretty well with the
23 product. We do well with Klor Con, our normal
24 one, and if we won, which I sure didn't think
25 we were going to short term. I'll admit now

1 when I went there, it was almost a forlorn
2 hope. But people are encouraged to negotiate
3 to reach an agreement, and that's what we did.

4 "QUESTION: Sure. What was Mr.
5 Driscoll's reaction?

6 "ANSWER: Very noncommittal. He
7 specifically said I don't want to discuss with
8 you the merits of the case. He just wanted to
9 hear what I had to say.

10 "QUESTION: Did he say anything else?

11 "ANSWER: Not of any substance.

12 "QUESTION: How long did the conversation
13 last?

14 "ANSWER: Half an hour, probably no more
15 than that.

16 "QUESTION: And how did the conversation
17 end?

18 "ANSWER: Again, very noncommittal. He
19 was clearly under instructions to say very
20 little, just listen to me and give no
21 encouragement to me or say anything
22 substantive. It was very frustrating."

23 MR. CARNEY: That's the only
24 counter-designation we have for Ian Troup, Your Honor,
25 at this time.

1 JUDGE CHAPPELL: Okay.

2 MR. GINSBURG: Our next reading, Your Honor, is
3 from the deposition of Mr. Ian Troup of October 25th,
4 2001.

5 "QUESTION: I'll try another way.

6 "You mentioned that -- when I asked you
7 what information about the licensed products
8 you had confirmed to Schering-Plough in
9 writing after the June 3rd meeting, you
10 mentioned that there was a packet of
11 information like Ms. O'Neill used in meetings
12 in Europe.

13 "Was information, printed information,
14 like Troup Exhibit 26, given to
15 Schering-Plough in the course of the
16 negotiations?

17 "ANSWER: From memory, this -- a document
18 substantially like this containing this type
19 of information was presented to them I believe
20 on the -- at a meeting of the 12th.

21 "QUESTION: Is that June 12th?

22 "ANSWER: June 12th, yes.

23 "QUESTION: Did the June 12th meeting
24 take place at Schering's offices in
25 Kenilworth, New Jersey?

1 "ANSWER: Yes, it did.

2 "QUESTION: Did you bring a packet of
3 information like Troup Exhibit 26 to that June
4 12th meeting?

5 "ANSWER: I brought a packet of
6 information like this, yes.

7 "QUESTION: Did you make an oral
8 presentation of the information like Troup
9 Exhibit 26 during the course of the June 12th
10 meeting?

11 "ANSWER: Looking at it now, I would have
12 made a cursory review of it and skipping parts
13 that I didn't understand and referring them,
14 remembering the audience were not necessarily
15 the audience that would have understood this,
16 so as is quite common in industry to say
17 here's the information, some of it you will
18 understand, some of it you will take back and
19 show it to other folks.

20 "QUESTION: When you did this oral
21 presentation at the June 12th meeting, did you
22 use slides or overheads or any visual aids?

23 "ANSWER: No, I didn't. No.

24 "MR. CURRAN: Objection, vague as to
25 'visual aids.'

1 "Does that include documents?

2 "THE WITNESS: Other than this document?

3 "QUESTION: No. Other than the document.

4 "You didn't discuss during the June 12th
5 meeting each page of the document, did you?

6 "ANSWER: I don't believe I would have,
7 no.

8 "QUESTION: At the end of the meeting,
9 did you leave the document with the Schering
10 people?

11 "ANSWER: Yes, I did.

12 "QUESTION: During the June 12th meeting,
13 did the Schering people at that meeting ask
14 any questions in the course of your oral
15 presentation of this material on Niacor-SR?

16 "ANSWER: If they did, I don't remember
17 specifically any of the questions they asked.

18 "QUESTION: You mentioned that you
19 skipped over some information that you didn't
20 understand. And I can sympathize, having
21 waded through this document.

22 "Can you recall what kind of information
23 you skipped over in the course of that June
24 12th meeting?

25 "ANSWER: It would have been the most

1 esoteric of the scientific material. I'd
2 characterize it like that, but I can't
3 specifically say I remember which pages."

4 MR. GINSBURG: Page 105, line 21:

5 "QUESTION: Do you recall when in the day
6 on June 16th the Schering people left Upsher's
7 premises?

8 "ANSWER: Not specifically, but I think
9 mid-afternoon.

10 "QUESTION: At the time the Schering
11 people left Upsher's premises in the
12 mid-afternoon of June 16, had you agreed on
13 the 28/20/12 split?

14 "ANSWER: I don't remember.

15 "QUESTION: After the Schering people
16 left, did you have further telephone
17 conversation with people at Schering about any
18 of the terms of the agreement other than the
19 legalese?

20 "MR. CURRAN: Just that day or --

21 "MS. BOKAT: At any time.

22 "THE WITNESS: The whole thing was
23 finalized with a conference call with people
24 from both sides and attorneys.

25 "QUESTION: When did that conference call

1 take place?

2 "ANSWER: On the evening of the 16th."

3 MR. GINSBURG: That's all of the reading from
4 Mr. Troup's deposition that we have, Your Honor.

5 JUDGE CHAPPELL: Thank you. Anything from
6 respondents?

7 MS. SHORES: Nothing for Schering, Your Honor.

8 MR. CURRAN: We have no -- nothing to read,
9 Your Honor. I do want to just point out that there was
10 reference to a document, a packet of clinical data.
11 That will be introduced later in the case. It's a
12 thick document, and that was what was being referred to
13 during the testimony you just heard.

14 JUDGE CHAPPELL: Thank you.

15 Who's next, Ms. Bokat?

16 MR. GINSBURG: The investigational hearing of
17 Martin Driscoll.

18 MS. BOKAT: And for the record, Your Honor,
19 Martin Driscoll at that time was vice president of
20 sales and marketing for Key Pharmaceuticals, a
21 subsidiary of Schering-Plough.

22 MS. SHORES: He -- at the relevant time with
23 respect to the facts in the lawsuit, he held that
24 position, Your Honor. That's not true at the time of
25 his investigational hearing, but it doesn't matter.

1 JUDGE CHAPPELL: Okay, well, at the time of
2 this investigational hearing -- by the way, when was
3 this?

4 MS. BOKAT: The date --

5 MR. GINSBURG: July 10th, 2000.

6 JUDGE CHAPPELL: Okay. Was he no longer with
7 Key at the time?

8 MS. SHORES: He was still with Key. At that
9 time he was vice president of marketing and sales for
10 the Schering Primary Care Business Unit.

11 JUDGE CHAPPELL: Thank you, Ms. Shores.

12 MS. SHORES: You're welcome.

13 JUDGE CHAPPELL: You may continue.

14 MR. GINSBURG: Thank you, Your Honor.

15 Page 61, line 22:

16 "QUESTION: Was that the first meeting
17 you attended between Schering-Plough and
18 Upsher-Smith about the patent litigation on
19 potassium chloride?

20 "ANSWER: No.

21 "QUESTION: When was the earlier meeting?

22 "ANSWER: The earlier meeting that I
23 recall was late March, perhaps early April of
24 1997. It was in that time frame. I'm not
25 sure which month.

1 "QUESTION: Where did it take place?"

2 Oh, I'm sorry.

3 "Who attended that meeting?"

4 "ANSWER: That was just myself and Mr.
5 Ian Troup from Upsher-Smith.

6 "QUESTION: Where did it take place?"

7 "ANSWER: It took place in my office in
8 Kenilworth, New Jersey.

9 "QUESTION: How did that meeting come
10 about?

11 "ANSWER: Well, that meeting came about,
12 there was -- as I recall the timing, I believe
13 it was early March of '97. There was a
14 hearing on the case. I recall it being a
15 March hearing, and I recall that it went well
16 for us, and there were discussions about --
17 and I had a thought that perhaps settlement
18 discussions could occur.

19 "We discussed it, and we contacted
20 Upsher-Smith to see if they would be willing
21 to meet and discuss potential concepts around
22 settlement of the patent litigation."

23 MR. GINSBURG: Page 63, line 21:

24 "QUESTION: How long did that meeting
25 last?

1 "ANSWER: My recollection about an hour
2 and a half to two hours.

3 "QUESTION: What did you do and Mr. Troup
4 discuss?

5 "ANSWER: Well, he came in and stated
6 that their case was very strong, that they
7 were going to prevail and prevail soon and
8 that the Court was going to find us in -- he
9 was using terminology like we would be
10 rendered trouble (sic) damages and et cetera,
11 et cetera.

12 "And I responded to him, I said, you have
13 your own merits -- you have your own position
14 in the case, we feel very strong about our
15 position in the case, let's agree that we both
16 differ in that regard, we feel very strong on
17 the merits of our case but I think we both can
18 agree that there are vulnerabilities perhaps
19 to each of our cases and maybe it would be
20 useful to talk about our discussions or have
21 discussions around concepts for potential
22 settlement.

23 "QUESTION: Did he respond?

24 "ANSWER: Oh, sure. He responded and was
25 adamant in his position, again continually

1 reinforced or restated his position that they
2 would prevail, that all we're doing is trying
3 to prevent them from coming on the market,
4 that we'll be hit with trouble (sic) damages
5 and that they feel very strong in their
6 position that there would be a lot of harm
7 come to us. And again I reinforce that the
8 position is yours, ours is ours, we feel very
9 strongly in our case and will prevail but
10 perhaps there's a middle ground where we can
11 seek a compromise.

12 "QUESTION: Did that elicit any movement
13 from Mr. Troup in his position?

14 "ANSWER: Mr. Troup's position was that,
15 in his mind, the only settlement was for us to
16 pay them to settle the situation.

17 "QUESTION: Did Mr. Troup say anything
18 about when he wanted to come to market under a
19 settlement?

20 "ANSWER: I don't recall a specific date,
21 but I do recall that he wanted his product on
22 the market within the next year."

23 MR. GINSBURG: Page 65, line 24:

24 "ANSWER: I mean, we had a discussion
25 rather extensively about his point about

1 paying -- us paying them to end the
2 litigation, and he was pretty forceful in
3 that, very forceful as a matter of fact, and I
4 was very forceful in saying, we simply cannot
5 do that.

6 "QUESTION: Did Mr. Troup indicate how
7 much money he wanted to receive from
8 Schering-Plough for the settlement?

9 "ANSWER: I recall. I recall in the
10 course of our discussions, and I believe it
11 was at that first meeting, I believe it was at
12 that first meeting, that he was using in the
13 neighborhood of -- he wanted a payment in the
14 neighborhood of 60 to \$70 million from
15 Schering to Upsher-Smith to end the
16 litigation."

17 MR. GINSBURG: Page 66, line 18:

18 "QUESTION: Did Mr. Troup say anything
19 about where he got his figures?

20 "ANSWER: I recall that he had discussed
21 that they had run some models indicating the
22 impact, if you will, of their product on the
23 market upon our K-Dur 20 milliequivalent, and
24 that served as the basis for what they felt he
25 should receive as a payment for the litigation

1 to end.

2 "QUESTION: Did he explain how the models
3 tied to the figure?

4 "ANSWER: I just recall generally that
5 from his standpoint, it was a percentage of
6 the, quote, unquote, harm that he felt the
7 product was going to be to Schering being on
8 the market in terms of our market performance
9 of ours. I don't recall the exact percentage.

10 "QUESTION: Was he saying that 60 to \$70
11 million would be Upsher's sales in some time
12 period?

13 "ANSWER: No. As I recall, his position
14 was that the availability of -- if they
15 prevailed in the litigation, that the
16 availability of their product on the market as
17 a generic to K-Dur 20 would have X impact on
18 Schering in terms of the performance of K-Dur
19 20 in the market and that he felt they should
20 receive a payment that was a percentage of
21 that impact.

22 "QUESTION: Was he talking about the
23 impact on K-Dur 20 in terms of lost sales to
24 Schering?

25 "ANSWER: Yes, and I responded that even

1 if they were to prevail in the litigation and
2 in fact -- and even if their product was able
3 to come to market, that that scenario for them
4 would not have occurred because we would
5 have -- if that ever occurred, we would market
6 our own generic formulation, and that they
7 would not be reaping substantial sales in that
8 regard."

9 MR. GINSBURG: Page 57, line 4:

10 "ANSWER: Well, I discussed with Mr.
11 Troup concepts around a potential settlement
12 of a patent case with them.

13 "QUESTION: What did you discuss at the
14 meeting about the settlement of the case?

15 "ANSWER: Well, again at that meeting we
16 discussed potential concepts around a
17 settlement.

18 "QUESTION: What concepts were you
19 discussing?

20 "ANSWER: Could we find a middle ground
21 on the settlement. It was just around those
22 areas I guess.

23 "QUESTION: Did you make a proposal about
24 a possible middle ground?

25 "ANSWER: I recall stating to them or

1 offering, if you will, a concept of if the
2 patent case was settled, allowing them on the
3 market at a point earlier than when our patent
4 on the formulation expired.

5 "QUESTION: Did you discuss when Schering
6 might let Upsher-Smith on the market if the
7 patent case settled?

8 "ANSWER: I recall indicating to them
9 that we would let them on the market at a
10 period if we settled -- at a period of about a
11 year sooner. I believe early 2006 was the
12 time we were proposing in the concept we were
13 discussing with them.

14 "QUESTION: Were you asking for anything
15 in return?

16 "ANSWER: Yes, the agreement to end the
17 litigation.

18 "QUESTION: Anything else?

19 "ANSWER: No. I don't recall anything
20 else.

21 "QUESTION: Was there any reaction from
22 the Upsher-Smith people to your proposal?

23 "ANSWER: Oh, yes.

24 "QUESTION: What was their reaction?

25 "ANSWER: They wanted to be on the market

1 much sooner.

2 "QUESTION: Did they mention a date when
3 they would like to be on?

4 "ANSWER: I don't recall a specific date,
5 but I do recall it was a great deal earlier
6 than 2006, 2005, 2006, whatever we had offered
7 as a proposal.

8 "QUESTION: During that meeting, was
9 there any movement on either -- excuse me.
10 Was there any movement on either side on the
11 date for Upsher-Smith to come to market if the
12 case was settled?

13 "ANSWER: I do recall, there wasn't a lot
14 of movement at that time."

15 MR. GINSBURG: That's all, Your Honor, from Mr.
16 Driscoll's investigational hearing.

17 JUDGE CHAPPELL: Ms. Shores?

18 MS. SHORES: We do have a brief
19 counter-designation, Your Honor. Your Honor, I'd like
20 to read -- to put this in context, what they read to
21 you, just a brief Q and A, and then read what they left
22 out, which is a brief Q and A, the question and answer
23 that immediately follows.

24 JUDGE CHAPPELL: Okay.

25 MS. SHORES: And I'm starting from their

1 designations at page 65, line 24.

2 "THE WITNESS: I mean, we had a
3 discussion rather extensively about his point
4 about paying -- us paying them to end the
5 litigation, and he was pretty forceful in
6 that, very forceful as a matter of fact, and I
7 was very forceful in saying, we simply cannot
8 do that.

9 "BY MS. BOKAT:

10 "QUESTION: Did Mr. Troup indicate how
11 much money he wanted to receive from
12 Schering-Plough for the settlement?

13 "ANSWER: I recall. I recall in the
14 course of our discussions, and I believe it
15 was at that first meeting, I believe it was at
16 that first meeting that he was using in the
17 neighborhood of -- he wanted a payment in the
18 neighborhood of 60 to \$70 million from
19 Schering to Upsher-Smith to end the
20 litigation."

21 MS. SHORES: That's the portion they read to
22 Your Honor, and here's our counter-designation:

23 "QUESTION: Did you indicate that
24 Schering was not prepared to pay 60 or \$70
25 million?

1 "ANSWER: I indicated very forcefully
2 that Schering was not going to pay any sum to
3 Upsher-Smith simply for them to stay off the
4 market."

5 MS. SHORES: That concludes our
6 counter-designation, Your Honor.

7 JUDGE CHAPPELL: Thank you.

8 MR. CARNEY: Your Honor, Upsher-Smith just has
9 one brief counter-designation. This relates to the
10 first meeting described by Mr. Driscoll, and this is at
11 page 65, line 11:

12 "QUESTION: Did you say anything about
13 when Schering might be willing to let
14 Upsher-Smith come on the market at this
15 specific meeting?

16 "ANSWER: I don't recall at that specific
17 meeting talking about from our standpoint a
18 date when they might come on the market from
19 our standpoint. I don't recall that at that
20 meeting.

21 "QUESTION: Was anything else discussed
22 at that meeting?

23 "ANSWER: No. As I stated earlier --
24 well, we did agree that we would go back and
25 think about it and that if possible or if we

1 both agreed after the meeting we'll get
2 together again within the next four weeks."

3 MR. CARNEY: That's all, Your Honor, from
4 Upsher-Smith regarding his investigative hearing.

5 JUDGE CHAPPELL: Thank you.

6 MR. GINSBURG: The next set of testimony we
7 would like to read, Your Honor, is from Mr. Raman
8 Kapur's investigational hearing of July 21st, 2000.

9 MS. BOKAT: And Mr. Kapur is head of Schering's
10 generic business.

11 MR. GINSBURG: Line 47 -- page 47, line 4:

12 "QUESTION: Would you describe for me the
13 discussions that were held in Minneapolis?

14 "ANSWER: Well, the basic discussions
15 focused on -- the basic discussions focused on
16 K-Dur. I tried to get some discussion going
17 on cholestyramine, but we didn't spend very
18 much time on it because Ian said we'll get to
19 that and he was more focused on K-Dur and
20 Marty was focused on K-Dur and Upsher-Smith's
21 product. I didn't get into the discussion
22 very much on the cholestyramine.

23 "QUESTION: What was discussed about
24 K-Dur?

25 "ANSWER: I didn't focus on it too much,

1 but my general recollection is that Marty
2 wanted to give -- to let Upsher-Smith in
3 earlier than the -- this is my general
4 recollection. Marty wanted to let
5 Upsher-Smith in earlier than the patent
6 expiration. Marty told Ian that he could not
7 entertain the idea of paying him anything for
8 staying off the market or to -- and Marty
9 explored with Ian if there was some way that
10 Upsher-Smith and Key could collaborate on
11 other things, things other than K-Dur, which
12 would add other commercial products, which
13 would add value to both companies, which would
14 result in a gain for Upsher-Smith, result in a
15 gain for Key.

16 "My recollection is that they didn't
17 reach a resolution because Ian was asking for,
18 my best recollection is somewhere around \$40
19 million or so and Marty said he couldn't
20 entertain that because there's no way he could
21 pay him anything. But, if there was a way
22 that Marty and Ian could find which would
23 result in creating value for both companies
24 and profit for both companies, another
25 commercial deal, he would listen to that.

1 But, he couldn't -- he couldn't pay him any
2 money. That's my recollection of the sum and
3 substance of that meeting. It didn't -- so,
4 they were really not able to -- they were on
5 different tracks."

6 MR. GINSBURG: Page 53, line 1:

7 "QUESTION: Do you recall whether Niacor
8 was discussed at that meeting?

9 "ANSWER: My best recollection is that it
10 did not come up at that meeting. It came up
11 at the next meeting. But, I don't recall for
12 sure exactly when -- which meeting it came up
13 at."

14 MR. GINSBURG: Page 104, line 9:

15 "QUESTION: When Mr. Troup was talking
16 about the money he wanted to receive from
17 Schering, was he looking for a revenue stream
18 to replace his generic version of K-Dur?

19 "ANSWER: At which point?

20 "QUESTION: At the time you first became
21 involved in the discussions.

22 "ANSWER: I was involved in the
23 discussions, but I was involved in -- I was
24 involved in a -- at different times and
25 different capacities.

1 "QUESTION: Right. I was trying to go
2 back to the first meeting you attended in
3 Minneapolis. At that time, is Mr. Troup
4 looking for a revenue treatment replacement
5 for his generic version of K-Dur 20?

6 "ANSWER: I really didn't focus on the
7 discussions, but that was my impression, that
8 he was looking for a revenue stream to replace
9 his --"

10 MR. GINSBURG: Page 53, line 14:

11 "QUESTION: Did you have any subsequent
12 discussions with Upsher-Smith?

13 "ANSWER: Yes.

14 "QUESTION: Would you describe the next
15 discussion?

16 "ANSWER: My recollection is that at the
17 next discussion, the idea of Niacor came up.
18 But, again, my recollection is not really
19 clear whether it came up during that last
20 meeting. My best recollection is that it came
21 at the next meeting. And at that meeting it
22 was discussed the issue of Schering licensing
23 Niacor and the fact that Schering had
24 international capability to be able to market
25 such a product.

1 "QUESTION: Was the discussion with
2 Upsher-Smith after the Minneapolis meeting a
3 telephone call or a face to face meeting?

4 "ANSWER: Again, my recollection is there
5 was a face to face meeting in New York. I
6 don't know whether there was a telephone call
7 in between or not -- or in New Jersey, rather.
8 I don't recall whether there was a telephone
9 conversation in between because it's very
10 difficult -- these things came together. It's
11 very difficult to keep things completely
12 segregated. But, my recollection is it came
13 up at the next meeting. That was the sum and
14 substance was some exploration on the Niacor
15 and Schering's capability in the international
16 arena."

17 MR. GINSBURG: Page 70, line 9:

18 "QUESTION: Who attended that Minneapolis
19 meeting?

20 "ANSWER: That was Jeff Wasserstein, John
21 Hoffman and myself.

22 "QUESTION: Who attended on behalf of
23 Upsher-Smith?

24 "ANSWER: Ian Troup was there, and again,
25 there may have been one other person from

1 Upsher-Smith, and I think -- I don't know
2 whether he was a part of the meeting or not,
3 but I think Paul Thompson made the trip up
4 there as well.

5 "QUESTION: What was Mr. Thompson's role?

6 "ANSWER: Mr. Thompson does licensing
7 agreements.

8 "QUESTION: For Schering or for
9 Upsher-Smith?

10 "ANSWER: For Schering. He's part of the
11 Schering-Plough Legal Department."

12 MR. GINSBURG: Page 118, line 7:

13 "QUESTION: Let's focus for a minute on
14 14. Why did you strike through 25 and
15 handwrite in 28?

16 "ANSWER: Because Ian wouldn't agree to
17 the 25.

18 "QUESTION: So, had you prepared Exhibit
19 14, and then as a result of subsequent
20 conversation with Mr. Troup, struck through
21 what he didn't agree to?

22 "ANSWER: My recollection is that I faxed
23 something to him. He did not agree with that,
24 with what I had faxed him. We talked on the
25 phone and he wanted cost plus 30 percent and

1 the 28 million. The 12 million, that's what
2 we finally agreed to. So, whether it was, you
3 know, what exactly that page had on it in
4 terms of handwriting and so on, I don't
5 recall. But, I do know that that was the
6 result of our negotiation.

7 "QUESTION: So, to double back to Mr.
8 Schildkraut's good question, did you fax
9 Exhibit 14 to Mr. Troup without the
10 handwriting?

11 "ANSWER: Yes."

12 MR. GINSBURG: That concludes, Your Honor, our
13 readings from Mr. Kapur's investigational hearing.

14 JUDGE CHAPPELL: Ms. Bokar, how many more are
15 there?

16 MS. BOKAT: I'm sorry, Your Honor?

17 JUDGE CHAPPELL: How many more readings are
18 there?

19 MS. BOKAT: Let's see, that would leave Mr.
20 Kapur's deposition, Mr. Hoffman's investigational
21 hearing and deposition and Mr. Wasserstein's
22 investigational hearing.

23 JUDGE CHAPPELL: Okay. What happened to Mr.
24 Carney?

25 Were you able to complete your

1 counter-designations for the transcripts that are being
2 read from today?

3 MR. CARNEY: Yes, Your Honor, we did.

4 JUDGE CHAPPELL: Okay.

5 MR. CARNEY: Thank you.

6 JUDGE CHAPPELL: Ms. Shores, do you have some
7 counter-designations?

8 MS. SHORES: We do, Your Honor, and Ms. Bieri
9 is going to question Mr. Loughlin with the Court's
10 permission.

11 MS. BIERI: Your Honor, if I were to read the
12 question and answer to really put it in context, it
13 would be half a page, so can I simply say that we are
14 going back to the first meeting in the series of
15 meetings?

16 JUDGE CHAPPELL: Right, that's fine.

17 MS. BIERI: Starting at page 49, line 9:

18 "QUESTION: Did Mr. Troup explain where
19 he got his \$40 million figure?

20 "ANSWER: I don't recall because I really
21 wasn't focused on that part of the
22 negotiation. I just remember in general
23 terms, the sum and substance, but I don't
24 recall the details of what went on.

25 "QUESTION: What did Mr. Troup want the

1 \$40 million for or what was he going to give
2 in return?

3 "ANSWER: You know, again, I don't
4 recall, you know, the details of this thing.
5 I just remember the sum and substance was that
6 Marty said he couldn't pay and Ian said he
7 wanted it and Marty said, you know, if you can
8 generate profits for Schering by promoting
9 something let's examine those things. They
10 were just on different tracks.

11 "QUESTION: Did Mr. Driscoll say why he
12 would not pay Mr. Troup?

13 "ANSWER: He said as -- my recollection
14 is he told him his legal people --"

15 MS. BIERI: Skipping to page 50, line 7.

16 "ANSWER: -- that his legal people would
17 not allow him to do that. They saw it as
18 being problematic and it was just not --
19 therefore, he really couldn't do anything.
20 That his legal people wouldn't allow him and
21 they wouldn't allow him to do that."

22 MS. BIERI: Page -- this is reading an extra
23 question and answer to put the next one in context,
24 page 104, line 19:

25 "QUESTION: Right. I was trying to go

1 back to the first meeting you attended in
2 Minneapolis. At that time, is Mr. Troup
3 looking for a revenue treatment replacement
4 for his generic version of K-Dur 20?

5 "ANSWER: I really didn't focus on the
6 discussions, but that was my impression, that
7 he was looking for a revenue stream to replace
8 his --

9 "QUESTION: Was Mr. Troup saying at that
10 time that he would be willing to keep his
11 generic product off the market if Schering
12 were willing to make payments to him?

13 "ANSWER: I don't recall any such
14 discussion. Now, where I was involved, I
15 don't recall any such discussions. You know,
16 I was not focusing on the discussion that was
17 going on for -- at that stage. I was not
18 focusing on the discussion on the K-Dur front.
19 I was there to try and get some products for
20 myself."

21 MS. BIERI: Page 50, line 24:

22 "QUESTION: Do you recall whether at that
23 meeting Mr. Driscoll said when Schering would
24 be willing to let Upsher-Smith come to market
25 with their generic of K-Dur?

1 "ANSWER: I don't specifically recall
2 whether it was at that meeting or somewhere
3 else. But, I seem to recall that he was
4 splitting the time. But, I don't recall
5 exactly. I couldn't give you the details and
6 of the timing and dates and so on, except
7 that -- I don't recall the exact dates of --
8 but I think it may have been, you know, 2001
9 type of time frame.

10 "QUESTION: When you mentioned splitting
11 the time, that's splitting the interval
12 between what and what?

13 "ANSWER: Again, my recollection is very
14 general between the date that they were
15 discussing and the patent expiration or
16 somehow he came up with kind of that thing.
17 But, I don't have a specific recollection of
18 exactly how he arrived at the date, but my
19 general recollection is it was a question of
20 splitting the time somehow, saying, look, why
21 don't we just settle it on this basis that we
22 let you in. That's my general recollection."

23 MS. BIERI: Page 55, line 13.

24 "QUESTION: You mentioned that Niacor was
25 discussed at this meeting in Kenilworth. What

1 was discussed about Niacor at that meeting?

2 "ANSWER: My recollection is that, Ian
3 brought up that he had a product that was like
4 the Kos product, the Kos Niaspan product which
5 we had written about and that he was in a
6 pretty advanced stage. He was planning a
7 submission by the end of the year and the work
8 had pretty much been done.

9 "What seemed particularly attractive was
10 it was a late stage product. It's very
11 difficult to find anybody willing to license
12 late stage products because the products
13 where, as you know, when you're developing a
14 product, a submission for the FDA, you have to
15 go through all the testing and the various
16 processes that go with it. And, usually when
17 people want to license something out, they
18 want to license it out to you at the earliest
19 stages before they have done all the work for
20 it for brand products because everyone is
21 looking, all pharmaceutical companies look for
22 late stage products. So, this seemed like a
23 great find to have a late stage product where
24 the submission was going to be made in just a
25 few months time.

1 "QUESTION: Was it Mr. Troup who first
2 mentioned Niacor at this meeting as opposed to
3 a Schering person?

4 "ANSWER: I believe so, yeah.

5 "QUESTION: Did he provide any
6 information about Niacor beyond that he
7 expected to submit it to the FDA by the end of
8 that year?

9 "ANSWER: I believe he did subsequently
10 provide some information including other data
11 from some clinical trials and some
12 presentations he made and I -- yeah, he
13 presented some data and he said he had also
14 been in discussion with some companies in
15 Europe. That's my recollection. He had a
16 data package."

17 MS. BIERI: Page 58, line 10:

18 "QUESTION: Did anyone at the meeting in
19 Kenilworth ask Upsher-Smith for the
20 information about Niacor?

21 "ANSWER: Yeah, I believe -- I don't
22 recall, you know, who did, but I believe that
23 we did ask them for information. Someone
24 asked them for information."

25 MS. BIERI: To put the next counter in context,

1 can we go to page 70, line 9:

2 "QUESTION: Who attended that Minneapolis
3 meeting?

4 "ANSWER: That was Jeff Wasserstein, John
5 Hoffman and myself.

6 "QUESTION: Who attended on behalf of
7 Upsher-Smith?

8 "ANSWER: Ian Troup was there and again
9 there may have been one other person from
10 Upsher-Smith and I think -- I don't know
11 whether he was part of the meeting or not, but
12 I think Paul Thompson made the trip up there
13 as well."

14 MS. BIERI: Skipping to page 71, line 2:

15 "QUESTION: What was discussed at that
16 meeting, the second Minneapolis meeting?

17 "ANSWER: At this meeting we basically
18 discussed the terms for -- we apprised them,
19 Jeff apprised them and I apprised them of our
20 interest in the Niacor product, that global
21 marketing had looked at it, they felt they
22 could do a decent job with it, a good job with
23 it, Schering would be a good partner and Jeff
24 had concluded that it was worth licensing the
25 product and he wanted to get the deal done.

1 So, it was a negotiation back and forth with
2 respect to the terms.

3 "QUESTION: Before this June meeting in
4 Minneapolis, had you and Mr. Wasserstein
5 discussed what the licenses were worth?

6 "ANSWER: Mr. Wasserstein and I, I don't
7 know exactly at what point he told me that,
8 but Mr. Wasserstein had discussed this with
9 global marketing and had come to the
10 conclusion that it was worth 70 million. The
11 question really was, what was the best we
12 could negotiate? In other words, the offer
13 that Ian had made, and to Jeff Wasserstein
14 seemed very attractive for a late stage
15 product and it was just a question of
16 negotiating the best terms."

17 MS. BIERI: Skipping to page 72, line 10:

18 "QUESTION: How did the -- how did the
19 discussion about the value of the license
20 unfold at the meeting?

21 "ANSWER: We did all the normal things
22 that you do in negotiations, which is to try
23 and tell him it was worth less and he would
24 say to us it was worth more and then we would
25 just go back and forth and that's basically

1 how it went. He was pretty inflexible about
2 the money. We had some side bars amongst
3 ourselves with respect to negotiation as well
4 because Jeff thought 70 was a good deal and we
5 should do it and I thought that my role was as
6 a negotiator and I thought that he could do
7 better. So, I told them that let's at least
8 try and make the ten contingent because even
9 though, you know, launches in the different
10 markets. That's how basically the discussion
11 went back and forth."

12 MS. BIERI: That's all, Your Honor. Thank you.

13 JUDGE CHAPPELL: Thank you.

14 MR. CARNEY: Nothing for Upsher-Smith, Your
15 Honor.

16 MR. GINSBURG: We would now like to read the
17 testimony of Mr. Raman Kapur from his deposition of
18 October 18, 2001.

19 Page 18, line 17:

20 "QUESTION: Did the subject of Niacor-SR
21 come up at the May 28th meeting?

22 "ANSWER: No."

23 MR. GINSBURG: Page 23, line 20:

24 "QUESTION: Was Mr. Troup asking for an
25 entry date earlier than 2001?

1 "ANSWER: Yeah. Again, you know, I --
2 there were discussions between them. I didn't
3 focus on what he may have asked for. He may
4 have asked for an earlier date, but I don't
5 recall the entire discussion that took place
6 between them because I was not focused on it.
7 I know that he wanted -- he would have wanted
8 immediate entry if he could have had it as
9 part of this lawsuit."

10 MR. GINSBURG: Page 75, line 4:

11 "QUESTION: I want to see if I can get
12 this two-day period clear. There was a
13 meeting in Minneapolis on the 16th of June.
14 Is that right?

15 "ANSWER: That's right.

16 "QUESTION: Do you recall when you left
17 that meeting?

18 "ANSWER: Do I recall when? What time we
19 left?

20 "QUESTION: Yes. What time of the day?

21 "ANSWER: It was sometime in the
22 afternoon or early evening or something. I
23 don't recall frankly the precise time.

24 "QUESTION: Did you fly back on June 16th
25 from Minneapolis back to New Jersey?

1 "ANSWER: That's my recollection, that we
2 went there in the morning and came back in the
3 evening or afternoon or evening or whatever
4 time it was.

5 "QUESTION: After your plane landed --
6 after your plane arrived in New Jersey, did
7 you go back to the office?

8 "ANSWER: I don't have a clear
9 recollection of -- it may have been -- I don't
10 know. I don't recall. I don't have a clear
11 recollection. I just know that there was a
12 lot of negotiation back and forth, and I don't
13 recall, you know, what took place where and
14 what time. I just know that there was a lot
15 of discussions over that period.

16 "QUESTION: In the night of June 16th to
17 June 17th, were you having phone discussions
18 with people from Upsher-Smith?

19 "ANSWER: I believe so, yeah. I believe
20 I was. Either it was late at night or early
21 morning or -- it was strange hours.

22 "QUESTION: So, it might have been early
23 in the morning of June 17. Is that right?

24 "ANSWER: As well -- yeah, I think it may
25 have been both, but, you know, I don't have a

1 precise recollection of all the -- all the
2 times. I just know it was a period of intense
3 discussion, and I know that some of those
4 discussions took place at unusual hours by
5 telephone."

6 MR. GINSBURG: Page 80, line 13:

7 "QUESTION: Kapur Exhibit 35, is that
8 something, if we just for the moment ignore
9 the handwriting and think just about the
10 printed page, is that something that you sent
11 to Mr. Troup?

12 "ANSWER: I may have. This is prepared
13 by me, so. And I did send him something that
14 laid out the terms. And this could be it.
15 Excluding the handwriting.

16 "QUESTION: Did you prepare this document
17 on June 17th, 1997?

18 "ANSWER: Yes, I did.

19 "QUESTION: Do you recall whether you
20 sent it to Mr. Troup that day?

21 "ANSWER: I believe I did, yes.

22 "QUESTION: Is that your handwriting on
23 the document?

24 "ANSWER: I believe so.

25 "QUESTION: Did you put the handwriting

1 on it after you had sent it to Mr. Troup?

2 "ANSWER: I believe so. That was because
3 Ian wanted -- I proposed cost plus 25 percent
4 and Ian wanted cost plus 30 percent. That's
5 where Ian adjusted the amounts as well that we
6 had offered 25, 20 and 15 and he wanted 28 and
7 the last one to be 12.

8 "QUESTION: When you talk about 25, 20
9 and 15, are those the installment payments?

10 "ANSWER: That's correct. These are the
11 installment payments for licensing of the
12 Niacor-SR product.

13 "QUESTION: After you sent this
14 document -- well, first I should ask you did
15 you send it to Mr. Troup by fax?

16 "MS. SHORES: Objection, I think he said
17 he believed he sent it or he may have sent it.

18 "ANSWER: I believe. I believe I would
19 have sent it by fax.

20 "QUESTION: Did you have --

21 "ANSWER: Without the handwriting, you
22 know.

23 "QUESTION: Did you have phone
24 conversations with Mr. Troup about the
25 agreement after you may have sent him this

1 document?

2 "ANSWER: Yes.

3 "MR. CURRAN: Objection. Foundation.
4 Talking about what agreement?

5 "QUESTION: Was it during a phone
6 conversation with Mr. Troup that you made the
7 handwritten notations on Kapur Exhibit 35?

8 "ANSWER: I believe so. I believe that
9 that's where -- that was the result of the
10 phone discussion.

11 "QUESTION: Do you remember what day the
12 phone discussion was?

13 "ANSWER: I believe it was on the same
14 day. It's my general recollection. You know,
15 I don't -- it's very difficult to keep every
16 conversation and time in mind, but that's my
17 recollection, that it was on the same day."

18 MR. GINSBURG: That's all the readings from Mr.
19 Kapur's deposition that we have, Your Honor.

20 MS. SHORES: We have no counter-designations,
21 Your Honor.

22 MR. CARNEY: No counter-designations for
23 Upsher-Smith, Your Honor.

24 JUDGE CHAPPELL: Okay.

25 MR. GINSBURG: The next testimony we would like

1 to read is from Mr. John Hoffman, from his
2 investigational hearing of July 25th, 2000.

3 MS. BOKAT: And Mr. John Hoffman is in-house
4 counsel to Schering-Plough.

5 MS. SHORES: Your Honor, he's staff vice
6 president in charge of litigation and antitrust at
7 Schering-Plough.

8 JUDGE CHAPPELL: Okay.

9 MR. GINSBURG: Page 32, line 8:

10 "QUESTION: Where did the subsequent
11 meeting occur?

12 "ANSWER: The next one I know about is in
13 Kenilworth in the law department conference
14 room."

15 MR. GINSBURG: Page 36, line 10:

16 "QUESTION: Was anything else discussed
17 at this meeting in the law department
18 conference room about settlement of the
19 lawsuit?

20 "ANSWER: Not that I recall. That's
21 not -- let me explain. I recall Ian Troup
22 saying that while he understood the construct
23 under which we were going to settle the
24 lawsuit, that Upsher-Smith had a need for
25 income, and it would have to be -- we would

1 have to do some sort -- some other sort of
2 deal so that they could have some income, and
3 discussing that that was okay, as long as that
4 deal stood on its own two feet."

5 MR. GINSBURG: Page 41, line 4:

6 "QUESTION: Was anything else discussed
7 at the meeting in the law department
8 conference room?

9 "ANSWER: Other than pleasantries, I
10 don't recall anything, no. I know at some
11 point we got data from Upsher-Smith on this
12 sustained release niacin product. I don't
13 know whether they brought it to that meeting
14 and gave it to us or whether we asked for it
15 at that meeting. My sense is they brought it
16 to that meeting, but if not, then we certainly
17 asked for some data, clinical data that they
18 had on the product."

19 MR. GINSBURG: Page 46, line 24:

20 "QUESTION: Were there meetings between
21 Schering and Upsher-Smith people after this
22 meeting in the law department conference room?

23 "ANSWER: There was a meeting in
24 Minneapolis at Upsher-Smith's office."

25 MR. GINSBURG: Page 49, line 16:

1 "QUESTION: How long did the meeting
2 last?

3 "ANSWER: It was -- I remember we flew
4 out on an awfully early plane. I think it was
5 6 o'clock, and I live an hour and a half from
6 the airport. I think it began about 9:00, and
7 my sense is we left there in the afternoon.
8 So, it was a long meeting."

9 MR. GINSBURG: That's all, Your Honor, we have
10 from Mr. Hoffman's investigational hearing. Thank you.

11 MS. BIERI: Schering does have some counters,
12 Your Honor.

13 Just for context, we're starting at page 32,
14 line 8:

15 "QUESTION: Where did the subsequent
16 meeting occur?

17 "ANSWER: The next one I know about is in
18 Kenilworth in the law department conference
19 room."

20 MS. BIERI: Skipping to page 35, line 3:

21 "QUESTION: Was there any discussion of
22 Schering making payments to Upsher-Smith in
23 order to settle the lawsuit?

24 "ANSWER: I don't recall whether that was
25 asked for directly. I recall that it was my

1 sense that that was something they thought we
2 should do. And I recall telling them we were
3 not going to do that."

4 MS. BIERI: Page 36, line 10:

5 "QUESTION: Was anything else discussed
6 at this meeting in the law department
7 conference room about settlement of the
8 lawsuit?

9 "ANSWER: Not that I recall. That's
10 not -- let me explain.

11 "I recall Ian Troup saying that while he
12 understood the construct under which we were
13 going to settle the lawsuit, that Upsher-Smith
14 had a need for income. And it would have to
15 be -- we'd have to do some other sort of deal
16 so they could have some income, and discussing
17 that that was okay, as long as that deal stood
18 on its own two feet."

19 MS. BIERI: Page 37, line 7:

20 "QUESTION: You said the deal would have
21 to stand on its own two feet?

22 "ANSWER: Uh-huh.

23 "QUESTION: Can you explain what you
24 meant by that?

25 "ANSWER: It had to be a separately

1 valued deal that we would do with or without
2 the settlement."

3 MS. BIERI: That's all, Your Honor.

4 JUDGE CHAPPELL: Thank you.

5 MR. CARNEY: No counter-designations for
6 Upsher-Smith.

7 JUDGE CHAPPELL: Okay, thanks.

8 MR. GINSBURG: The next set of testimony we'd
9 like to read is from Mr. Hoffman's deposition of
10 October 26th, 2001.

11 Page 49, line 11:

12 "QUESTION: Were the licenses in any way
13 connected to the ongoing litigation with
14 Upsher-Smith?

15 "ANSWER: Yes, in some way.

16 "QUESTION: In what way?

17 "ANSWER: Let me answer it this way,
18 because it involves what Mr. Smith -- what Mr.
19 Troup told me on that subject. In our meeting
20 in Kenilworth, I think it was after -- I know
21 it was after I had said, Mr. Troup, we can go
22 on like this for a long time, but we've
23 already agreed on September 1, 2001, and we're
24 here to discuss licensing. He said
25 something -- and I'm going to paraphrase but

1 pretty close -- that's all well and good for
2 you to say. We can reach that agreement on
3 the date, and that's fair, but we have cash
4 needs. And I said something to the effect,
5 well, if we can reach an agreement that stands
6 on its own two feet, I would be comfortable
7 with that."

8 MR. GINSBURG: Page 41, line 7:

9 "QUESTION: Now, in Minneapolis, you
10 mentioned the last meeting you attended in
11 Minneapolis?

12 "ANSWER: Yes. I only attended one
13 meeting in Minneapolis.

14 "QUESTION: Okay, okay.

15 "ANSWER: On this subject or with
16 Upsher-Smith for that matter.

17 "QUESTION: Now, after returning from
18 this meeting, were there any further
19 negotiations with Upsher-Smith after?

20 "ANSWER: There were some telephone
21 conversations. I wouldn't characterize them
22 as negotiations in a broad sense, and I should
23 correct my prior -- the investigative hearing
24 on this subject. It's one of the things I
25 noticed when I read that and having looked at

1 some of these documentation.

2 "We came back on the evening or afternoon
3 of the 16th, and I thought we signed the
4 agreement the next morning at 3:00 a.m. It's
5 a day later. So, we came back on the 16th, we
6 had some discussions with Upsher-Smith. I
7 recall particularly a phone call with Mr.
8 Cannella where he gave me some comments on a
9 draft of the -- of what you've marked as
10 Exhibit 2.

11 "QUESTION: Okay, yes.

12 "ANSWER: And I recall that Mr.
13 Wasserstein was reviewing it. Mr. Kapur and I
14 think they were having other discussions
15 either with Paul Thompson or with Ian, but
16 the -- it was in the wording of the document.
17 I don't think anything of substance changed in
18 that process. Then after the day of the 17th,
19 we signed it up at about 3:00 a.m. or so on
20 the morning of the 18th.

21 "MR. NIELDS: Just so it's clear, I think
22 the witness is saying that in his earlier
23 testimony, he said that he believed the final
24 agreement was signed at 3:00 in the morning
25 after the meeting in Minneapolis, and now he's

1 saying he believes it was signed at 3:00 on
2 the morning a day later, so that two mornings
3 after the meeting in Minneapolis.

4 "THE WITNESS: Right.

5 "QUESTION: Okay.

6 "ANSWER: But if I'm correct, and maybe
7 this just makes it easier, if we were in
8 Minneapolis on Monday, I think I previously
9 testified that I thought we signed it on
10 Tuesday morning at 3:00 a.m. I believe it was
11 Wednesday morning at 3:00 a.m."

12 MR. GINSBURG: That's all the readings we have
13 from Mr. Hoffman's deposition, Your Honor.

14 MS. SHORES: We have no counter-designations,
15 Your Honor.

16 MR. CURRAN: Your Honor, we have no
17 counter-designations, but maybe I should add that
18 there's reference in that last passage to Mr. Cannella.
19 For your information, he was outside counsel to
20 Upsher-Smith with regard to these negotiations.

21 JUDGE CHAPPELL: Thank you, Mr. Curran.

22 Mr. Ginsburg?

23 MR. GINSBURG: The next reading we would like
24 to do is from Mr. Jeffrey Wasserstein's investigational
25 hearing of September 14th, 2000.

1 MS. BOKAT: At the time of the agreement
2 between Schering and Upsher-Smith, Jeffrey Wasserstein
3 was vice president of business development for
4 Schering.

5 MS. SHORES: Staff vice president for corporate
6 business development, that's essentially correct. At
7 the time of the taking of his investigational hearing,
8 he was the president and general manager of
9 Schering-Plough Canada.

10 JUDGE CHAPPELL: Thank you.

11 MR. GINSBURG: Page 47, line 9:

12 "QUESTION: Okay, what can you recall
13 about that meeting?

14 "ANSWER: Could you be a little bit more
15 specific?

16 "QUESTION: Just in general, tell me
17 everything you recall about the meeting.

18 "ANSWER: I recall that myself, John
19 Hoffman, Paul Thompson and Ray Kapur flew out
20 to meet with Mr. Ian Troup. I recall that Ian
21 Troup was there. I seem to vaguely recall
22 that there may have been somebody else from
23 his company who may have sat in for a part of
24 the meeting and that we went back and forth on
25 a number of points that had been I guess open

1 issues up to that stage in the negotiation and
2 that at the end of the meeting, there was
3 enough sort of general agreement and
4 understanding that we were getting close
5 enough to put together some terms of agreement
6 and see if we could finalize some of the
7 remaining open issues."

8 MR. GINSBURG: Page 88, line 20:

9 "QUESTION: Do you recall any
10 conversation about Upsher-Smith wanting a
11 stream of income to replace what they thought
12 their potassium chloride product would earn?

13 "ANSWER: I recall that they were very
14 insistent on one of their deal points, that
15 they get an up-front payment and cash as part
16 of the license deal.

17 "QUESTION: Do you recall that? And when
18 you say 'they,' are we talking about Mr.
19 Troup?

20 "ANSWER: Yes, Mr. Troup.

21 "QUESTION: Because he was the only one
22 speaking, right?

23 "ANSWER: Yes, you're right. I'm using
24 'they' to represent Mr. Troup, their
25 president, and Mr. Troup was insistent about a

1 stream of income.

2 "QUESTION: A stream of income. Did he
3 tie it to replace the income he would not get
4 from the potassium chloride?

5 "ANSWER: He may have. I don't recall
6 specifically right now.

7 "QUESTION: But he may have said that?

8 "ANSWER: He may have, sure.

9 "QUESTION: But you remember he was being
10 insistent on getting the up-front payments?

11 "ANSWER: Yes."

12 MR. GINSBURG: Page 100, line 22:

13 "QUESTION: Okay, and could you turn to
14 the page marked SP 1200246.

15 "ANSWER: Yes.

16 "QUESTION: Do you see on the second
17 paragraph the line that starts, 'In connection
18 with settlement discussions of a patent
19 litigation brought by Key Pharmaceuticals
20 against Upsher-Smith involving Upsher-Smith's
21 Klor Con M20 potassium chloride product,
22 Upsher-Smith informed us that they were
23 seeking an income stream to replace the income
24 that Upsher-Smith had anticipated earning if
25 it were able to successfully defend against

1 Key's infringement claims'? Do you see that
2 line?

3 "ANSWER: Yes.

4 "QUESTION: Does that refresh your
5 recollection at all about whether Mr. Troup
6 told you that he was looking for an income
7 stream to replace what they thought they would
8 have earned on their own potassium chloride
9 product?

10 "ANSWER: A bit, yes.

11 "QUESTION: Do you recall now him saying
12 that?

13 "ANSWER: I -- a bit, yes.

14 "QUESTION: And that would have been at
15 the meeting in Minneapolis, is where he would
16 have said that you would have heard it?

17 "ANSWER: At the meeting in Minneapolis
18 or on phone conversations that evening or as
19 we were finalizing the agreement, it could
20 be -- it could have been in either place."

21 MR. GINSBURG: Page 97, line 2:

22 "QUESTION: Do you recall how long it was
23 after you got back, whether it was that
24 evening or some days later, that you finally
25 reached agreement with Upsher-Smith, 'you'

1 being Schering-Plough, reached agreement with
2 Upsher-Smith on all of the points?

3 "ANSWER: What I recall is that all the
4 major points of agreement were reached that
5 evening. Again, I don't recall whether there
6 was any kind of, you know, smoothing out on
7 the edges of language or sort of minor let's
8 sleep on it that happened and signature pages.
9 I don't recall either way.

10 "QUESTION: At some point you did
11 exchange signature pages, you had a signed
12 agreement?

13 "ANSWER: I -- yes.

14 "QUESTION: Do you have any sense for how
15 long that process -- how long that was after
16 the meeting?

17 "ANSWER: No. As I said, it may have
18 been that evening or it may have been within
19 the next couple of days.

20 "QUESTION: But would -- it would have
21 been within a couple of days?

22 "ANSWER: I believe so. I seem to recall
23 that it was, yes.

24 "QUESTION: After your work that evening,
25 at some point you said that one of your tasks

1 was to draw up a document to be presented to
2 the board of directors. Is that right?

3 "ANSWER: Yes.

4 "QUESTION: When did you start working on
5 that?

6 "ANSWER: Presumably reasonably soon
7 after the agreement, but I don't recall
8 exactly the date.

9 "QUESTION: Okay. But you didn't start
10 working on that until after the agreement was
11 signed?

12 "ANSWER: Yes."

13 MR. GINSBURG: That's all the readings, Your
14 Honor, from Mr. Wasserstein's investigational hearing.

15 MS. BIERI: We have some counter-designations,
16 Your Honor.

17 JUDGE CHAPPELL: Okay, you may proceed.

18 MS. BIERI: Starting at page 88, line 20:

19 "QUESTION: Do you recall any
20 conversation about Upsher-Smith wanting a
21 stream of income to replace what they thought
22 their potassium chloride product would earn?

23 "ANSWER: I recall that they were very
24 insistent on one of their deal points, that
25 they get an up-front payment and cash as part

1 of a license deal."

2 MS. BIERI: Skipping to page 89, line 19:

3 "QUESTION: Was that something that
4 Schering-Plough would generally rather not do, make the
5 up-front payments in a license agreement?

6 "ANSWER: As I mentioned earlier, we have
7 deals with or without the up-front payments, and
8 usually it's -- it's more driven by the people we're
9 licensing with, what's their major point of contention,
10 whether they want it or not. So, it's not something
11 where I think there's a strong bias one way or the
12 other."

13 MS. BIERI: Going to page 100, line 22:

14 "QUESTION: Okay, and could you turn to the
15 page marked SP 1200246?

16 "ANSWER: Yes.

17 "QUESTION: Do you see on the second
18 paragraph the line that starts, 'In connection with the
19 settlement discussions of patent litigation brought by
20 Key Pharmaceuticals against Upsher-Smith involving
21 Upsher's Klor Con M20 potassium chloride product,
22 Upsher-Smith informed us that they were seeking an
23 income stream to replace the income that Upsher-Smith
24 had anticipated earning if it were able to successfully
25 defend against Key's infringement claims'? Do you see

1 that line?

2 "ANSWER: Yes."

3 MS. BIERI: Skipping to page 105, line 12:

4 "QUESTION: The next to last line in that
5 paragraph says, 'We informed them that any
6 such deal should stand on its own merit
7 independent of the settlement.' Do you see
8 that line?

9 "ANSWER: Yes, I do.

10 "QUESTION: And where it says, 'We
11 informed them,' is that Upsher-Smith?

12 "ANSWER: I believe so, yes.

13 "QUESTION: What do you mean, 'on its own
14 merit, independent of the settlement'?

15 "ANSWER: Meaning that any licensing deal
16 that we were going -- that we were doing with
17 Upsher-Smith had to be valued as a licensing
18 deal without any consideration of the
19 settlement."

20 MS. BIERI: That's all, Your Honor.

21 JUDGE CHAPPELL: Thank you.

22 MR. CARNEY: Nothing, Your Honor.

23 MS. BOKAT: That concludes our readings for
24 today, Your Honor.

25 JUDGE CHAPPELL: Okay. What do you intend to

1 do next? Live witness or responsive readings?

2 MS. BOKAT: What I would like to do, if it
3 pleases the Court, tomorrow morning would be to call
4 Professor Timothy Bresnahan, a live witness.

5 JUDGE CHAPPELL: Okay. He's coming from the
6 east or the west?

7 MS. BOKAT: He's a professor at Stanford
8 University.

9 JUDGE CHAPPELL: It is now approaching if not
10 after 5:00 p.m., so we will -- is 9:30 tomorrow
11 acceptable for everyone?

12 MR. NIELDS: Yes, Your Honor.

13 MR. CURRAN: Yes, Your Honor.

14 MS. BOKAT: Yes, Your Honor.

15 JUDGE CHAPPELL: Did that mode of presentation
16 seem to work for the attorneys?

17 MR. CURRAN: As to mode, perhaps, Your Honor.
18 I -- I was sitting here thinking that those IHs were
19 being offered against Upsher-Smith, but we'll deal with
20 that at a later date.

21 JUDGE CHAPPELL: Conditionally admitted, Mr.
22 Curran.

23 MR. CURRAN: Very good, thank you, Your Honor.

24 JUDGE CHAPPELL: With that, hopefully the
25 record will make sense.

1 So, tomorrow we're going to have a live
2 witness. Are there more readings to come later?

3 MS. BOKAT: Yes, there will be some more.

4 JUDGE CHAPPELL: Okay. Is it -- is it a burden
5 on you to let the opponents know the order so that, for
6 example, if Mr. Carney hasn't done so yet, he can get
7 his responsive designations to you? Do they know the
8 order you're going to call or you're going to read
9 these excerpts?

10 MS. BOKAT: What I would propose to do is get
11 all our remaining excerpts together -- let me step
12 back.

13 What we gave respondents' counsel a few days
14 ago was a list of all our readings. We've done some
15 now. I think what we better do is give them a list of
16 the remainder, this time organized by witness, not by
17 topic, and in the order of witnesses in which we plan
18 to read them.

19 JUDGE CHAPPELL: I think that would be helpful,
20 if you will agree to do that.

21 MS. BOKAT: Yes, Your Honor.

22 JUDGE CHAPPELL: Mr. Curran or Mr. Carney, I --

23 MR. CURRAN: We can deal with that, Your Honor.

24 JUDGE CHAPPELL: Okay.

25 MR. CURRAN: Yeah, we'll be ready to

1 counter-designate or counter-read or whatever at any
2 appropriate time.

3 JUDGE CHAPPELL: It sounds like Mr. Carney did
4 get busy.

5 MR. CARNEY: Yes, Your Honor.

6 MR. CURRAN: Stayed busy.

7 JUDGE CHAPPELL: Anything else?

8 MS. BOKAT: Your Honor, can I raise one
9 housekeeping matter before we conclude for the day?

10 JUDGE CHAPPELL: Yes.

11 MS. BOKAT: We were reviewing the transcript of
12 one of our days of pretrial conference discussing the
13 exhibits, and I think there's an error in the
14 transcript, and I wanted some guidance from the Court
15 on how logistically we should go about creating the
16 page.

17 This is from Tuesday, January 22nd. Your Honor
18 was talking to Mr. Carney and Mr. Meier about some AHP
19 exhibits. If I'm reading the page right, it's page
20 279, line 16:

21 "JUDGE CHAPPELL: These exhibits you just
22 listed, Mr. Meier, 165, 66, 67, 70, 467 and 744, are
23 those all AHP exhibits?"

24 I think it should have read, "165, 166, 167,
25 170," because 65, 66 and 70 aren't AHP exhibits. I

1 believe the transcript just dropped that number 1.

2 JUDGE CHAPPELL: Okay, then at the next point
3 in time there, did I admit those exhibits or were we
4 just talking about them? That was the 22nd, that would
5 have been Monday -- what day -- what is today?

6 MS. BOKAT: That was Tuesday, Your Honor.

7 JUDGE CHAPPELL: Tuesday, thank you.

8 MS. BOKAT: Then there's further discussion.
9 Mr. Meier reads those numbers again and reads them
10 correctly, and then Your Honor repeats those numbers
11 correctly and says, "Okay, CX 165, 166, 167, 170, 467
12 and 744 are admitted, but subject to the Government
13 proving up to my satisfaction that they come under the
14 co-conspirator exception." That's at page 280, and the
15 portion I began reading started at line 14.

16 JUDGE CHAPPELL: Okay, when I admitted them,
17 they were correctly named and numbered?

18 MS. BOKAT: They were.

19 JUDGE CHAPPELL: And do you -- since they're
20 your exhibits, do you think there's a problem if they
21 were misidentified earlier, a material issue there?

22 MS. BOKAT: I don't. I just was seeking some
23 guidance from Your Honor on how you thought we should
24 deal with this, because it hasn't come up yet, but --

25 JUDGE CHAPPELL: You mean how to correct the

1 transcript?

2 MS. BOKAT: Yeah.

3 JUDGE CHAPPELL: Let's sleep on that. We'll
4 talk about that later. Thanks for bringing that up,
5 though.

6 Anything else?

7 MR. CURRAN: No, Your Honor.

8 JUDGE CHAPPELL: We are in recess until
9 tomorrow morning at 9:30. Thank you.

10 (Whereupon, at 5:05 p.m., the hearing was
11 adjourned.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: JANUARY 24, 2002

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 1/25/02

13

14

15

16 SUSANNE BERGLING, RMR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

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